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In the Supreme Court of the United States

OCTOBER TERM, 1979

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WALTER TANTZEN, INC., AND INSURANCE COMPANY OF NORTH AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the Director of the Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-10a) is reported at 601 F.2d 670. The opinion of the Benefits Review Board (App. D, *infra*, 16a-29a)

is not reported. The decision of the administrative law judge (App. E, *infra*, 30a-38a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 11a-12a) was entered on June 29, 1979. The Director's petition for rehearing was denied on October 5, 1979 (App. C, *infra*, 13a-15a). On January 10, 1980, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 2, 1980, and on January 28, 1980, he further extended the time to and including March 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a claimant under the Longshoremen's and Harbor Workers' Compensation Act must show that at least one of his employer's employees works "upon actual, as distinguished from statutorily defined, navigable waters of the United States."

STATUTE INVOLVED

1. Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining

> pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

2. Section 2(3) of the Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *.

3. Section 2(4) of the Act, 33 U.S.C. 902(4), provides:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

STATEMENT

1. On October 21, 1974, Thomas Shaughnessy, a member of Scaleman's Local 935 of the International Longshoremen's Association and an employee of respondent Walter Tantzen, Inc., was injured in the course of his employment when he was struck in the chest by a 40-pound pry bar (App. D, *infra*, 17a). The injury occurred on a pier in Brooklyn, New York, at a cargo inspection point approximately 20 feet from the water. As the result of his injury, Shaugh-

nessy is permanently and totally disabled (App. D, *infra*, 17a, 18; App. E, *infra*, 34a-36a).

Respondent Tantzen is in the business of weighing, sampling, inspecting, and reconditioning imported bulk commodities such as rubber, coffee, cocoa, and tin. The company is retained to perform these tasks by the domestic consignees of the goods. Shaughnessy's work, like that of Tantzen's other employees, was normally performed on the pier near the water as soon as possible after cargo had been unloaded from a ship (App. D, *infra*, 20a-21a). Longshoremen would remove cargo from a ship and place it at an off-loading point on the pier. From there, either longshoremen or Tantzen's employees, including Shaughnessy, would move the cargo to the weighing and sampling site (*ibid.*). When reconditioning was necessary, Shaughnessy and his co-workers would move the cargo within the pier to the extent required (*id.* at 21a). Once the tasks of sampling, weighing, and reconditioning were completed, Shaughnessy's involvement with the cargo would end, and longshoremen would remove the cargo from the inspection point and either deliver it to the consignee for immediate transportation out of the marine terminal or place it in a storage area within the terminal to await land-based transportation (*ibid.*; App. E, *infra*, 33a).

2. After his injury, Shaughnessy filed a timely claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* An administrative law judge held that

Shaughnessy and respondent Tantzen were both "engaged in maritime employment" and thus were a covered "employee" and "employer" within the meaning of the Act (App. E, *infra*, 34a). The judge stated that "the weighing, sampling, and reconditioning of the cargo prior to delivery to the consignee is [*sic*] an integral and essential part of the process of unloading and movement" of bulk commodities (*ibid.*). The judge further concluded that Shaughnessy is permanently and totally disabled as a result of his employment-related injury (*id.* at 35a). The judge therefore entered a compensation order on Shaughnessy's behalf (*id.* at 37a-38a).

Respondent Tantzen (and its insurance carrier, respondent Insurance Company of North America) appealed the administrative law judge's decision to the Benefits Review Board. See 33 U.S.C. 921(b). Respondents conceded that Shaughnessy was injured on the "navigable waters of the United States," as that term is used in Section 3(a) of the Act, 33 U.S.C. 903(a), and that the "situs" requirement of Section 3(a) was therefore satisfied (App. D, *infra*, 19a). Respondents argued, however, that Shaughnessy was not an employee within the definition of Section 2(3) of the Act, 33 U.S.C. 902(3), "because his job of inspecting break-bulk cargo is not maritime employment" (App. D, *infra*, 19a). They also contended that, "because [Tantzen] has no control over the movement of cargo, it is not a statutory employer" within the meaning of Section 2(4) of the Act, 33 U.S.C. 902(4) (App. D, *infra*, 19a).

A divided panel of the Benefits Review Board affirmed the administrative law judge's ruling (App. D, *infra*, 16a-29a). The Board held that an employer is a statutory "employer" under Section 2(4) if it has an employee who is engaged in maritime employment (App. D, *infra*, 20a). Accordingly, the Board stated, if Shaughnessy's employment activities can be characterized as maritime employment, then he is an "employee" under Section 2(3) and Tantzen is an "employer" under Section 2(4) (App. D, *infra*, 20a). The Board then concluded that Shaughnessy's tasks qualified as "maritime employment" within the meaning of Section 2(3). It explained (App. D, *infra*, 22a, 24a, 25a):

> The work of scalemen such as claimant is analogous to aspects of longshore checking and is so closely related to the process of unloading as to be an integral part of it.
>
> * * * [I]t is the nature of break-bulk cargo, and the exigencies of shipping it by sea, which necessitate the type of inspection and reconditioning provided by [Tantzen's] personnel. * * *
>
> * * * * *
>
> It is well established also that although a claimant does not actually load, unload, or transport maritime cargo, his or her employment duties come within the scope of maritime employment if they are found to be essential to the movement of maritime cargo. * * *
>
> The principle is applicable here * * *. It is the scalemen's report which clears the way for the consignee's acceptance. The scalemen's inspection activities are therefore essential to the movement of maritime cargo from the vessel toward the point of transshipment to a land-based mode of transport. Claimant's employment is consequently a part of the overall longshoring operations, and thus a type of maritime employment within the meaning of Section 2(3) of the Act.

Respondents petitioned for review in the court of appeals, challenging the Board's holding that Shaughnessy was engaged in "part of the overall longshoring operations" and was therefore an "employee" under Section 2(3) of the Act. Although the question of Shaughnessy's employee status was the sole dispute between the parties (App. A, *infra*, 2a), the court decided the case on a wholly different ground.

The court of appeals observed that no evidence in the record showed that "Shaughnessy or any other employee of Tantzen was ever upon actual, as distinguished from statutorily defined, navigable waters of the United States" (App. A, *infra*, 6a). For this reason, the court held (*id.* at 7a-9a), the record failed to establish that respondent Tantzen is a statutory employer under Section 2(4) of the Act. Accordingly, the court concluded, Shaughnessy cannot be covered by the Act, even if he was engaged in longshoring operations within the meaning of Section 2(3) at the time of his injury.

The court of appeals' analysis followed three steps. It began with the assumption that "employer" status under Section 2(4) is an independent requirement for coverage under the Act. The court then emphasized that an employer is not a statutory employer

under Section 2(4) unless it has at least one employee engaged in "maritime employment." Finally, the court declared that the phrase "maritime employment" as used in the Act "means employment seaward of the line drawn by *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 * * * (1917)" (App. A, *infra*, 7a). In other words, according to the court of appeals, when the Act refers in Sections 2(3) and 2(4) to persons or employees engaged in "maritime employment," it means only persons "engaged in employment upon actual water" (App. A, *infra*, 7a). Relying on its decision in *Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, No. 79-759 (Jan. 14, 1980), the court explained (App. A, *infra*, 7a) that, when Section 2(3) of the Act defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations," the statute "uses the word 'including' inexactly; as there used 'including' means 'as well as.'" Thus, in the court's view, not every person engaged in longshoring operations is engaged in "maritime employment" within the meaning of the Act. Only persons working on actual water are engaged in "maritime employment," and an employer must have at least one such employee if any of its employees are to be covered by the Act.

Because the record did not demonstrate that respondent Tantzen employed any person who worked on actual water, the court remanded the case to the Board, "leav[ing] the [Board] free in its turn to

remand the case to an [administrative law judge] to hear any evidence that shows that in fact Shaughnessy or any other Tantzen employee was employed in maritime employment in the sense of employment upon actual water" (App. A, *infra*, 9a).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision and reasoning are directly contrary to this Court's ruling in *P.C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979), decided several weeks after the court of appeals' denial of rehearing in the present case. In another case under the Longshoremen's and Harbor Workers' Compensation Act, decided on the same day as this case by the same court of appeals' panel, this Court has recently granted certiorari, vacated the judgment below, and remanded for reconsideration in light of *Pfeiffer*. See *Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, No. 79-759 (Jan. 14, 1980). Although we believe that the result reached by the court of appeals in *Fusco* was correct, the panel's opinion in that case was flawed by the same overly restrictive reading of the phrase "maritime employment" that produced an incorrect outcome here. The Court should now dispose of the present case in the same way that it handled *Fusco*. A remand for reconsideration would permit the court of appeals to apply the teachings of *Pfeiffer* consistently and would avoid an erroneous interpretation of the Act in the circuit that contains the nation's busiest deep-water port.

The court of appeals erred in two respects. First, the court assumed without discussion that, in order to establish coverage under the Act, an injured worker must show that his employer is a statutory "employer" within the meaning of Section 2(4). This assumption ignores the plain language of the coverage provision in Section 3(a), which requires only that an injured worker be an "employee" within the meaning of Section 2(3) and that his injury have occurred on a covered "situs," *i.e.*, on the navigable waters of the United States, including any adjoining pier, wharf, dry dock, or terminal area. As this Court remarked in *Pfeiffer* (slip op. 4), "[t]o be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains injury on the situs defined by § 3(a)." There is no additional requirement that his employer satisfy the statutory definition in Section 2(4).[1]

The court of appeals' error in adding a third prong to the Act's coverage test would have been of little consequence if the court had not also misinterpreted the phrase "maritime employment" as it is used in Sections 2(3) and 2(4). In defining "employee," Section 2(3) first uses the general description "person engaged in maritime employment" and then provides several specific examples of workers engaged in such employment, including longshoremen and

[1] We agree with the Benefits Review Board, however, that if an employee qualifies as an employee under Section 2(3) of the Act, his employer will inevitably qualify as an employer under Section 2(4) (App. D, *infra*, 20a).

other persons engaged in longshoring operations. In defining "employer," however, Section 2(4) refers only to "an employer any of whose employees are employed in maritime employment"; the subsection does not give specific examples of employees who are so employed. No significance should be attached to Section 2(4)'s failure to repeat the catalogue of specific occupations that qualify as maritime employment. The examples are listed in Section 2(3), and there was no need for Congress to repeat them in the very next sentence of the Act.

The court of appeals, however, ruled that "maritime employment" comprehends only employment on the actual navigable waters of the United States and that the full meaning of the statutory term can be derived from cases decided before the 1972 amendments to the Act. See *Fusco* v. *Perini North River Associates*, *supra*, 601 F.2d at 664-665, cited with approval in App. A, *infra*, 7a. Because it believed that "maritime employment" should be interpreted in accordance with decisions applying the original 1927 Act, the court adopted an unnatural reading of the word "including" as it is used in Section 2(3). Instead of recognizing that all the specific occupations listed in Section 2(3) are examples of "maritime employment," the court held that, to the extent those occupations are not performed on actual water, they should be viewed as additional kinds of work covered by the Act in the same way that maritime employment is covered. In short, the court decided that the word

"including" in Section 2(3) means "as well as" rather than "for example" (App. A, *infra*, 7a).

This analysis was explicitly rejected in *P.C. Pfeiffer Co.* v. *Ford, supra.* The Court there stated (slip op. 8 & n.7) (citations omitted):

> Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment." * * * The term "maritime employment" refers to the nature of a worker's activities. Thus § 2 (3) uses the phrase "longshorem[e]n or other person[s] engaged in longshoring operations" as one example of workers who engage in maritime employment no matter where they do their job. * * *
>
> * * * * *
>
> Petitioners apparently assume that a person engaged in "longshoring operations" is not necessarily engaged in "maritime employment." But the language of § 2(3) provides that an employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations * * *." The petitioner's argument supposes that the word "including" means "and" or "as well as." We understand the word "including" to indicate that "longshoring operations" comprise a part of the larger group of activities that make up "maritime employment."

Moreover, the Court's discussion of the definition of "employer" in Section 2(4) of the Act demonstrates that the term "maritime employment" should

not be construed more narrowly in that context than in the definition of "employee" in Section 2(3). The Court stressed in *Pfeiffer* (slip op. 9) that, in the amended version of the Act, Section 2(4), like Section 3(a), refers to "the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." The Court observed that it would have made no sense for Congress to speak, in Section 2(4), of "maritime employment" in this broad geographical setting if "maritime employment," by its very nature, embraces only work performed on the actual navigable waters. In the Court's words (slip op. 9):

> If the term "maritime employment" [in Section 2(4)] referred only to work that might take employees seaward of the *Jensen* line, then the broader situs test in the final clause of this section would become virtually superfluous. We decline the invitation to construe "maritime employment" so as to create two differing situs requirements in a single sentence.

In the present case, the court of appeals' erroneous addition to Section 3(a)'s coverage test and its overly restrictive reading of the phrase "maritime employment" produced a holding that neither Shaughnessy nor any other Tantzen employee could recover compensation under the Act unless at least one such employee worked on the actual navigable waters of the United States. This misreading of the statute would deny

coverage to numerous employees clearly engaged in longshoring operations (*e.g.*, the stripping and stuffing of containers) because of the fortuity that their employers do not have any employees working on the actual navigable waters of the United States. Moreover, if the court's decision is permitted to stand, employers and their insurance carriers in the Second Circuit may well revise the employment structure in marine terminals in order to avoid covering more employees than necessary under the Act. For example, employers of dock and pier workers might attempt not to employ any persons who may at times work either aboard a vessel or in some other capacity on actual water. By this strategem, employers would be able to ensure that none of their employees is entitled to the benefits of the Act, even if all or virtually all of them are engaged in longshoring operations and therefore qualify as statutory "employees" under Section 2(3).

In large measure, the ultimate result of the court of appeals' holding would be similar to the one specifically rejected in *Pfeiffer*: an employee's coverage would depend on whether he or one of his co-workers is subject to assignment aboard a vessel. The Court should grant certiorari and vacate the judgment of the court of appeals in order to avoid the accomplishment, through a slightly more circuitous route, of the very end held impermissible in *Pfeiffer*.

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be remanded for reconsideration in light of *P.C. Pfeiffer Co.* v. *Ford*, *supra*.

Respectfully submitted.

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FEBRUARY 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 949, Docket 79-4034

WALTER TANTZEN, INC., and INSURANCE COMPANY OF NORTH AMERICA, PETITIONERS

v.

THOMAS SHAUGHNESSY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

Argued April 30, 1979

Decided June 29, 1979

Joseph F. Manes, New York City, for petitioners-appellants.

Saul C. Downes, Rowen, Downes, Cascione & Chechanover, New York City, for respondent-appellee.

Carin Ann Clauss, Laurie M. Streeter, Mary A. Sheehan, U.S. Dept. of Labor, Washington, D.C., for party in interest.

Before GURFEIN and MESKILL, Circuit Judges, and WYZANSKI, Senior District Judge.*

WYZANSKI, Senior District Judge:

An employer and its insurer petition us to review the December 29, 1978 order of the Benefits Review Board, [BRB], United States Department of Labor affirming the order of the administrative law judge

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* Of the District of Massachusetts, sitting by designation.

[ALJ] awarding compensation to Thomas Shaughnessy [hereinafter "claimant"] pursuant to the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424; 86 Stat. 1251. 33 U.S.C. §§ 901-950 (1976) [LHWCA].

The petition assigns no specific error. (App. 1a). Petitioners' brief (p. 2), reciting that "the sole question presented is whether the claimant's injury . . . meets the jurisdictional requirements (status) of the Act," discusses only whether plaintiff was an "employee" within § 2(3) of the LHWCA, 33 U.S.C. § 902(3).[1] The employee question is also the only issue discussed by respondents' briefs. However, as will appear, we are of the opinion that we cannot avoid another question—whether the respondent Walter Tantzen, Inc. was an "employer" within § 2(4) of LHWCA, 33 U.S.C. § 902(4).[2]

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[1] The relevant statutory section defining "employee," with italics indicating the material added to the original statute by 1972 amendments, 86 Stat. 1251, 33 U.S.C. § 902(3) (1970 ed., Supp. V) provides:

> The term 'employee' *means any person engaged in maritime-employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

[2] "Employer" was defined in 33 U.S.C. § 902(4):

> The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [including any dry dock].

The ALJ made the folowing brief findings[3] as to the nature of the employer's business and of the claimant's work:

> Employer was engaged in the business of weighing, sampling, and inspection of various imported commodities, including rubber, the material being handled by Claimant on October 21, 1974. Employer is hired by the importing dealers or their agents. The particular material being handled is unloaded from the ship by longshoremen and placed inside the pier. From that point Employer's personnel move the commodity in position to be weighed, after which the bale is opened by means of pry bars and a cutting instrument to be inspected. The container is reclosed by Employer's men, and then the commodity is moved by longshoremen to its ultimate destination to be accepted by the consignee. Employer's main functions are weighing, reconditioning, and sampling the commodity.

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[3] We deprecate the course followed by the BRB in supplementing the ALJ's findings with its own findings, especially on contested matters. Congress provided that "the findings of fact [by the ALJ] in the decision under review by the [Benefits Review] Board shall be conclusive if supported by substantial evidence in the record considered as a whole." § 21(b)(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(3) (Supp. III, 1973). *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976); *Potenza* v. *United Terminals*, 524 F.2d 1136, 1137 (2nd Cir. 1975). If additional findings are necessary the BRB may "remand a case to the administrative law judge" to make additional findings. § 21(b)(4) of the LHWCA; 33 U.S.C. § 921(b)(4). Except with respect to uncontested matters, the BRB is not entitled to make its own findings of fact, nor are we.

On the basis of his limited findings the ALJ stated that:

> I find and conclude that Employer is engaged [sic] in maritime employment, and that at the time of his injury Claimant was doing [sic] likewise. It is clear that the weighing, sampling, and reconditioning of the cargo prior to delivery to the consignee is [sic] an integral and essential part of the process of unloading and movement of the commodity to the point where it is turned over to the consignee.

Accordingly, the ALJ entered a compensation order for claimant.

Upon appeal by the employer and its insurer, a majority of three members of the BRB concluded that the claimant was "engaged in longshoring operations" within the meaning of § 2(3) which was a "type of maritime employment within the meaning of § 2(3) of the Act" (App. 17a. Compare App. 15a) and, therefore, the BRB entered its December 29, 1978 order affirming the ALJ's order.

We do not find it necessary on this inadequate record [4] to decide whether Shaughnessy was indeed

[4] The inadequate record makes it difficult, if not impossible, to know what duties longshoremen customarily perform. We repeat the suggestion of Judge Friendly in *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 47 (2nd Cir. 1976), approved on appeal by the Supreme Court, *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 272-273, note 34, 97 S.Ct. 2348, 53 L.Ed.2d 320, that the BRB prepare a study of what work longshoremen perform. We, apparently like Judge Friendly and Mr. Justice Marshall, would regard it as appropriate for the BRB, even though it is not a fact-

"engaged in longshoring operations." [5]

finding body (see 33 U.S.C. § 21(b)(3)) and has only review functions, to use such a study in later reviews of orders of ALJ's. This would amount to an exercise of judicial notice with respect to facts "either generally known," or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This would be in accordance with Fed.R.Evidence 201(a), which, although not controlling BRB or other tribunals acting in an appellate capacity, as is evident from Fed.R.Evidence 1101, nonetheless sets a standard appropriate for an appellate tribunal which contemplates taking judicial notice of any matter. *United States* v. *Casson,* 140 U.S.App.D.C. 141, 148, 434 F.2d 415, 422 (1970).

[5] On the record as it now stands we cannot tell whether Shaughnessy's case is distinguishable from Blundo's case decided in *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Blundo in opening containers, checking the contents, stripping from the containers the cargo, marking the separate shipments destined for different consignees, and placing those shipments in a bonded warehouse was performing in a new setting work which was the *functional equivalent* of what longshoremen had previously done. It was for that reason that the Court held that Blundo was engaged in longshoring operations. *Ibid.,* pp. 270-271, 97 S.Ct. 2348. Until we know more about what longshoremen customarily do we cannot tell whether there is a similar equivalency with respect to Shaughnessy's duties in weighing bales which belong to an individual consignee, opening them, inspecting them, reconditioning their contents, and reclosing them. Obviously, what Shaughnessy does is directed at the weighing of a particular consignee's shipment and the inspection and reconditioning of its contents, and we are uninformed as to what longshoremen do with respect to individual shipments.

Moreover, the present findings of the ALJ do not show clearly whether after Shaughnessy has finished his inspection he, in effect like a switchman, directs a gang of longshoremen

An examination of the record reveals no evidence that Shaughnessy or any other employee of Tantzen was ever upon actual, as distinguished from statutorily defined, navigable waters of the United States (hereinafter sometimes called "actual water"). Nor do either the ALJ or the BRB say that Shaughnessy or any other employee of Tantzen was on actual water. What they do say or imply is that the fact that Shaughnessy was engaged in longshoring operations means that he was in maritime employment" within the meaning of both § 2(3) and § 2(4) and that it follows that Tantzen was an employer within § 2(4). In our opinion, this reasoning involves a *nonsequitur*, a misconstruction of § 2(3), an incorrect interpretation of the term "maritime employment" as used in both § 2(3) and § 2(4), a misapplication of the cases holding that once it has been determined that a claimant is engaged in "maritime employment" it follows that his employer is an employer within § 2(4), and a result squarely contrary to a declared Congressional purpose.

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whether to take the bales to the consignee's truck or to take them to a storage warehouse.

In pointing to these *lacunae*, we have not indicated whether we agree with Shaughnessy's contention and the BRB's view that the word "engaged" in the phrase "engaged in longshoring operations" means merely "directly involved." See *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co.* v. *Winchester*, 554 F.2d 245, 247 (5th Cir.), *second pet. for rehearing on other grounds granted*, 569 F.2d 428 (1978); *J. A. McCarthy, Inc.* v. *Bradshaw*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 433 U.S. 905, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *adhered to on reconsideration*, 564 F.2d 89 (3d Cir. 1977).

In *Fusco et al.* v. *Perini et al.*, —— F.2d —— (2nd Cir. 1979) we explained that, as used in § 2(3), the phrase a "person engaged in maritime employment" is to be read geographically as meaning a person engaged in employment upon actual water. When § 2(3) defines "employee" as "any person engaged in maritime employment, including any longshoreman," § 2(3) uses the word "including" inexactly; as there used "including" means "as well as." § 2(3) does not say, what obviously is not the case, that every longshoreman is engaged in employment upon actual water. Hence the *mere* fact that employment in longshoring operations is a type of employment within § 2(3) does *not* make it a type of "maritime employment" as those two words are used in § 2(3).

Nor is employment in longshoring operations on land "maritime employment" as that term is used in § 2(4). As *Fusco* v. *Perini*, *supra*, details at length, and as *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962) finally settled, the term "maritime employment" as used in § 2(4) means employment seaward of the line drawn by *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). There is no showing that Shaughnessy or any other Tantzen employee ever spent any part of any working day seaward of the *Jensen* line.

The cases to which the BRB refers, such as *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977) and *Handcor Inc.* v. *Director*,

568 F.2d 143, 144 (9th Cir. 1978), and cases like *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F.2d 1080, 1083 (4th Cir. 1975), *modified en banc on other grounds*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded sub nom. Adkins* v. *I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *rev'd on remand on other grounds*, 563 F.2d 646 (1977), as well as texts such as 4 Larson, Workmen's Compensation Law (1979) § 89.27 p. 16-178, and Gilmore and Black, The Law of Admiralty (2d ed., 1975), p. 429, lines 14-16, which indicate that once the claimant's status as an "employee" is established the employer automatically becomes an "employer" failed to consider the problem presented by the instant case—where a worker claims the status of a statutory § 2(3) "employee" because he is a longshoreman but is not himself in maritime employment. What those authorities say about the claimant's proving that his employer is a statutory § 2(4) employer by proving that he is a § 2(3) employee is true if and only if the employee also proves that he is employed over actual water.

That the foregoing statement is sound is convincingly shown by the Congressional Committee Reports which accompanied the 1972 amendments to the 1927 LHWCA. See, S.Rep.No.92-1125, 92 Cong. 2 Sess. (1972) and H.R.Rep.No.92-1441, U.S.Code Cong. & Admin.News 1972, p. 4698. The Committees were explicit in their intention to exclude from LHWCA liability any employer who had no employees on actual water:

> Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters. S.Rep. 15; H.R. Rep. 11.

Although we must set aside the BRB's December 29, 1978 order because there is no proof that the employer Tantzen is subject to the LHWCA, we, in remanding the case, leave the BRB free in its turn to remand the case to an ALJ to hear any evidence that shows that in fact Shaughnessy or any other Tantzen employee was employed in maritime employment in the sense of employment upon actual water. Such a reopening of the case may seem fair in view of a misunderstanding so generally shared in this case by all, and not even exposed in the briefs or at the oral argument.

If the case is re-opened it might be appropriate to take further evidence and to make more specific findings as to (1) Shaughnessy's own duties, (2) what, if any, duties longshoremen perform in connection with weighing, opening, inspecting, and reconditioning the contents of bales or other packages of individual consignees, and (3) what form of report, if any, a scaleman like Shaughnessy makes to the long-

shoremen who pick up bales when the scaleman has finished his work.

Petition granted.

The December 29, 1978 Benefits Review Board order is set aside and the case is remanded to the Benefits Review Board for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of June, one thousand nine hundred and seventy-nine.

Present: HON. MURRAY I. GURFEIN,
Circuit Judge

HON. THOMAS J. MESKILL,
Circuit Judge

HON. CHARLES EDWARD WYZANSKI, JR.,
District Judge

79-4034

WALTER TANTZEN, INC., and INSURANCE COMPANY OF NORTH AMERICA, PETITIONERS

v.

THOMAS SHAUGHNESSY, RESPONDENT

and

DIRECTOR, OWCP, PARTY IN INTEREST

A petition for review of an order of the Benefits Review Board of the Department of Labor

This cause came to be heard on the record of the Benefits Review Board and was argued by counsel

Upon consideration thereof,

It is hereby ordered adjudged and decreed that the petition for review be and it hereby is granted and the action remanded to said Board for further proceedings in accordance with the opinion of this court with costs to be taxed against the respondents.

A. DANIEL FUSARO
Clerk

BY: /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine hundred and seventy-nine.

Present: HON. MURRAY I. GURFEIN,
Circuit Judge

HON. THOMAS J. MESKILL,
Circuit Judge

HON. CHARLES E. WYZANSKI,
District Judge

Docket No. 79-4034

WALTER TANTZEN, INC., and INSURANCE COMPANY OF NORTH AMERICA, PETITIONERS

v.

THOMAS SHAUGHNESSY, and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

A petition for a rehearing having been filed herein by counsel for the Director, Office of Workers' Compensation Programs,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine-hundred and seventy-nine.

Docket No. 79-4034

WALTER TANTZEN, INC., and INSURANCE COMPANY OF NORTH AMERICA, PETITIONERS

v.

THOMAS SHAUGHNESSY, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Director, Office of Workers' Compensation Programs, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Irving R. Kaufman
Chief Judge

APPENDIX D

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

[SEAL]

BRB No. 78-133

[Filed as part of the record—Dec. 29, 1978—
Agnes Kurtz, Clerk, Benefits Review Board]

THOMAS SHAUGHNESSY, CLAIMANT-RESPONDENT

v.

WALTER TANTZEN, INC.

and

INSURANCE COMPANY OF NORTH AMERICA,
EMPLOYER/CARRIER-PETITIONERS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PARTY-IN-INTEREST

DECISION

Appeal from the Decision and Order of Freeman C. Murray, Administrative Law Judge, United States Department of Labor.

Saul C. Downes (Rowen, Downes, Cascione & Chechanover), New York, New York, for the claimant.

Joseph F. Manes, Croton-on-Hudson, New York, for the employer/carrier.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

MILLER, Member:

This appeal by the employer/carrier (hereinafter, the employer), from a Decision and Order (77-LHCA-597) of Administrative Law Judge Freeman C. Murray, is brought pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter, the Act).

The claimant, a member of Scaleman's Local 935, International Longshoremen's Association, was struck in the chest on October 21, 1974, by a forty-pound pry bar with which he was helping to open a half-frozen bale of rubber weighing approximately 245 pounds. Claimant was working at the time on a pier in Brooklyn, about twenty feet from the water's edge. He was hospitalized from the day he was struck until November 11, 1974, as well as several times thereafter. In a report dated June 8, 1976, a Veterans Administration Hospital staff physician rated the claimant as "100% totally disabled." The claimant, when injured, was in his late forties and had worked for the employer off and on for about twenty years. Since being injured, claimant has undergone coronary bypass surgery and has not worked.

At the hearing, claimant and employer stipulated to the employer-employee relationship; the injury; that the injury arose out of and in the course of employment; notice; timely filing of the compensation claim; average weekly wage of $272; voluntary payment of compensation for temporary total disability from October 21, 1974, through March 7, 1977; that employer had not paid for medical services pursuant to Section 7 of the Act, 33 U.S.C. § 907; and that claimant has not returned to his regular employment.

The administrative law judge found claimant to be permanently, totally disabled by arteriosclerotic heart disease connected with his employment. He then held that the claim came under the Act, and accordingly awarded the claimant compensation for permanent total disability in the amount of $181.33 per week, to be adjusted pursuant to Section 10(f) of the Act, 33 U.S.C. § 910(f). The administrative law judge also ordered the employer to pay additional compensation pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e), with interest at six percent per annum from the due date of each overdue payment, as well as medical benefits pursuant to Section 7 of the Act.

The employer appeals the administrative law judge's determination that the claim comes within the jurisdiction of the Act. The Board is limited to determining whether the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational, and are otherwise consistent with applicable law. If so, they must be affirmed. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965). We affirm the Decision and Order of the administrative law judge.

For this claim to be compensable under the Act, the jurisdictional "situs" and "status" requirements must be met. First, the claimant must be injured over the navigable waters of the United States. 33 U.S.C. § 903(a). The employer concedes that claimant was injured on a situs covered by the Act.

The second requirement is that the claimant have the status of a statutory employee. Section 2(3) of the Act, 33 U.S.C. § 902(3), defines this as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker. . . .

The employer maintains that claimant is not an employee within the meaning of the Act, because his job of inspecting break-bulk cargo is not maritime employment. The employer argues also that, because it has no control over the movement of cargo, it is not a statutory employer.

Section 2(4) of the Act, 33 U.S.C. § 902(4), provides that

> the term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States. . . .

The Act does not provide that, in order to be a statutory employer, one must have control over the movement of cargo. Statutory status as an employer results from having an employee who is engaged in maritime employment. We need therefore consider claimant's employment activities only. If these can be characterized as maritime employment, the employer is thereby brought within the purview of Section 2(4). *Accord*: *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Kelley* v. *Handcor, Inc.*, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978), *aff'g* 1 BRBS 319, BRB Nos. 74-165 & 74-165A (Feb. 28, 1975); *Jacksonville Shipyards* v. *Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1976), *vacated and remanded sub nom. Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), *reaffirmed*, 575 F.2d 79 (5th Cir. 1978); *Carroll* v. *Hullinghorst Industries, Inc.*, 7 BRBS 538, BRB No. 76-500 (Jan. 22, 1978); *Harris* v. *Maritime Terminals, Inc.*, 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

The sole business of the employer in this case is to weigh, sample, test, inspect and, when necessary, recondition imported commodities such as rubber, coffee, cocoa, and tin. The employer is hired for this purpose by domestic consignees of the commodities. Most of the time, the claimant worked with rubber. Longshoremen off-load the commodities from ships

and bring them to where they are to be weighed and sampled. On rare occasions this can be some distance from the water, but usually the weighing is done in the pier as closely as possible to the off-loading point and very shortly after cargo is deposited there. Frequently, scalemen themselves remove cargo from the sling and transport it from off-loading point to pier. Claimant testified that "nine times out of the ten, we'll unhook the nets from the crane because they haven't got enough men or the facilities to do it." The inspection and sampling is done soon after off-loading, sometimes within twenty minutes.

The employer also reconditions commodities which have been damaged in transit, by drying dampened bales, for instance, and by removing wood splinters which have become embedded in bales of rubber. When such reconditioning is necessary, claimant and his fellow workers hand-truck the bales fifty or one hundred [*sic*; the Board's opinion appears to contain an omission at this point] finished weighing, inspecting, or otherwise handling a given shipment, they report on its condition to an agent of the consignee. This ends the employer's involvement with the cargo. It can be as many as five days thereafter before longshoremen remove the bales from the weighing point for transfer to a land-based form of transportation.

Although Congress, when enacting the "status" requirement, did not define "maritime employment," "longshoreman," or "longshoring operations," the Senate and House Committee reports give some guidance.

> The committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. . . . However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08, quoted in *Northeast Marine Terminal Co., supra,* note 27. Longshore checking includes noting damage sustained by cargo during shipping. *Dictionary of Occupational Titles,* Third Edition, 1965, Vol. I, at 119. The work of scalemen such as claimant is analogous to aspects of longshore checking and is so closely related to the process of unloading as to be an integral part of it.

There is, moreover, no question that removing cargo from slings and trucking it to the pier are longshoring operations, and therefore maritime employment. The record indicates that longshoremen are by contract supposed to do it. Longshoremen injured while engaged in this activity would be covered by the Act: 33 U.S.C. § 902(3); scalemen or weighers do that same work. The record indicates also that it is the nature of break-bulk cargo, and the exigencies of shipping it by sea, which necessitate the type of inspection and reconditioning provided by employer's personnel. We think that the maritime nature of the work is clear.

When claimant dealt with cargo, it was unquestionably in the stream of maritime rather than land commerce. "The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. . . . The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation." *Sea-Land Service, Inc.* v. *Director, OWCP and Johns,* 540 F.2d 629, 639 (3d Cir. 1976). Claimant regularly worked on the pier and on the stringpiece, close to the water and well away from the line drawn in *Johns.*

The claimant, in addition, actually handled the break-bulk cargo, hand-trucking it as necessary, moving it on and off the scales, and so forth. This distinguishes him from "purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo . . . ," whom the Senate and House Committees did not intend to cover. *Northeast Marine Terminal Co., supra,* note 27. It distinguished him likewise from the claimant in *Maher Terminals Inc.* v. *Farrell,* 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), *rev'g* 3 BRBS 42, BRB No. 75-183 (Dec. 10, 1975), which denied benefits under the Act to a marine terminal office clerk whose principal duty was to examine documents presented by outside truckers. Although cargo was evidently in maritime commerce when he was concerned with it, the clerk in

Farrell did not handle it, and was therefore held by the Third Circuit to be outside the coverage of the Act.

It is well established also that although a claimant does not actually load, unload, or transport maritime cargo, his or her employment duties come within the scope of maritime employment if they are found to be essential to the movement of maritime cargo. It has been so held, for instance, in the case of waterfront mechanics who maintain equipment used in longshoring operations. *Bradshaw* v. *J.A. McCarthy, Inc.*, 3 BRBS 195, BRB Nos. 75-209, 209A, and 209B (Jan. 26, 1976), *petition for review denied*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 97 S.Ct. 2967 (1977), *aff'd mem.* 564 F.2d 89 (1977). *See also Jameson* v. *Marine Terminal Corp.*, 6 BRBS 424, BRB No. 76-275 (Aug. 11, 1977); *Stecz* v. *Sea-Land Service, Inc.*, 6 BRBS 291, BRB No. 76-350 (July 5, 1977); *Thompson* v. *Oceanic Containers Service, Inc.*, 5 BRBS 831, BRB No. 76-294 (May 12, 1977). The U.S. Court of Appeals for the Ninth Circuit, affirming the Board, has applied this principle in the case of a gear lockerman who inspected, maintained, refueled, and repaired stevedoring equipment, and transported it between the locker and the dock: the lockerman's function was an "integral and essential part of the overall longshoring operations." *Brady-Hamilton Stevedore Co.* v. *Herron*, No. 75-1535 (8th Cir. Jan. 23, 1978), 7 BRBS 409, 410, *aff'g* 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975).

The principle is applicable here, as well. It is the scalemen's report which clears the way for the consignee's acceptance. The scalemen's inspection activities are therefore essential to the movement of maritime cargo from the vessel toward the point of transshipment to a land-based mode of transport. Claimant's employment is consequently a part of the overall longshoring operations, and thus a type of maritime employment within the meaning of Section 2(3) of the Act.

We do not think that claimant's status as a consignees' agent affects his status as a statutory employee. The record shows that it is the consignee who, after accepting, arranges for longshore personnel to take the inspected cargo from the weighing point to the point of transshipment. We do not doubt that the longshoremen effecting this further movement of the cargo do so as the consignee's agents, and we do not doubt that they are covered under the Act. *Cf. Northeast Marine Terminal Co. supra.*

We are enjoined so to interpret the Act as to avoid "harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328 (1953). Discussing maritime workers injured on a shoreside "situs," the Supreme Court has observed that "The language of the [Act] is broad and suggests that we should take an expansive view of the . . . coverage. Indeed, such a construction is appropriate for this remedial legislation." *Northeast Marine Terminal Co., supra*, at 264. Our Decision that claimant is an employee within the meaning of

Section 2(3) of the Act accords with this policy. To hold otherwise would open a gap in the Act's shoreward coverage excepting claimant and similar workers, while protecting other shoreside workers who handle cargo still moving in the stream of maritime commerce from vessel to point of transshipment.

We hereby affirm the Decision and Order of the administrative law judge.

/s/ Julius Miller
JULIUS MILLER
Member

I Concur:

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Member

Dissent of SMITH, Chairman, to follow.

Dated this 29th day of December 1978.

SMITH, Chairman, Dissenting:

I respectfully dissent from the decision of the majority.

When Congress in 1972 amended Section 3(a) of the Act, 33 U.S.C. § 903(a), to include in the definition of navigable waters ". . . any pier, wharf . . . terminal . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel," it did not intend thereby to provide benefits under the Act for every worker injured on a newly-covered situs.

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08, quoted in *Sea-Land Service, Inc.* v. *Director, OWCP and Johns*, 540 F.2d 629 (3d Cir. 1976). For coverage under the Act, Congress therefore required that a claimant be injured on the situs, and that he have

the status of an employee, that is, a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. . . ." 33 U.S.C. § 902(3). The activities of the employer and the claimant in this case both lack the maritime nexus necessary to found appropriate status under the Act.

The employer acts always as the agent for Goodyear, Firestone, Uniroyal, and other land-based consignees. The claimant handled cargo solely to protect those consignees' interests by ascertaining, before acceptance, the quality and condition of the cargo; he did not handle it in order to further its progress through the stream of maritime commerce. Claimant's position is therefore legally indistinguishable from that of a consignee's outside trucker who picks cargo up on the pier for shipment by land. The trucker, although injured over navigable waters, is not intended to be covered under the amended Act. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 267 (1977); *Sea-Land Service, Inc., supra* at 637, 638. This is because the amended definition of navigable waters is less a delineation of a geographical area than a means of expressing the relationship of dockside activities to maritime transport.

> The reference in §§ 902(4) and 903(a) to the navigable waters of the United States should be regarded [as] no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus.

Sea-Land Service, Inc., supra at 638. There is no jurisdiction under the Act if the maritime relationship is not established.

The committee reports' examples of workers not covered under the amended Act indicate that the touchstone for longshore employment is whether a claimant is required "to participate in the loading or unloading of cargo" or is "directly involved in the loading or unloading functions." *Sea-Land Service, Inc., supra* at 637, 638. The claimant here is neither directly involved in unloading operations nor indirectly involved. Those operations would be unaffected by the absence of scalemen such as claimant. Claimant handles cargo to facilitate inspecting operations only. His employment activity is oriented toward the demands of land commerce exclusively. He is therefore not engaged either in longshoring operations, or in maritime employment within the meaning of Section 2(3) of the Act. I would reverse.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chairman

APPENDIX E

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

Case No. 77-LHCA-597

OWCP No. 2-37667

IN THE MATTER OF

THOMAS SHAUGHNESSY, CLAIMANT

v.

WALTER TANTZEN, INC., EMPLOYER

and

INSURANCE COMPANY OF NORTH AMERICA, CARRIER

Saul C. Downes, Esquire
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For the Claimant

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For the Employer
and Carrier

Carin Ann Clauss, Solicitor of Labor
Laurie M. Streeter, Associate Solicitor
Linda L. Carroll, Esquire
U.S. Department of Labor
Suite N-2716, NDOL
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Washington, D.C. 20210

For the Director,
OWCP

BEFORE: FREEMAN C. MURRAY
Administrative Law Judge

DECISION AND ORDER

Jurisdictional and Procedural History

This is a claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. 901 *et seq.*

Stipulations

It is stipulated and agreed by and between the parties that at all times pertinent to this case that (Tr. 5-7):

1. Claimant and Employer were in an employee-employer relationship.

2. The injury occurred on October 21, 1974.

3. The injury arose out of and in the course of the employment.

4. Employer had timely notice of the injury.

5. Claimant filed a timely claim for compensation.

6. Claimant's average weekly wage at the time of injury was $272.00, indicating a compensation rate of $181.33.

7. Employer voluntarily paid compensation for temporary total disability from October 21, 1974, through March 7, 1977. The first payment was not made until January 30, 1975, when $2,160.00 was paid, bringing up to date the installments due from October 22, 1974, to January 21, 1975. From January 21, 1975, to March 7, 1977, compensation payments were made on a bi-monthly basis, and the parties agreed there was no controversy as to penalties under Section 14 of the Act with respect to this latter period.

8. Employer has not paid for medical services pursuant to Section 7 of the Act.

9. Claimant has not returned to his regular employment.

Issues

1. Whether the parties are subject to the jurisdiction of the Act.

2. The nature and extent of disability consequent to the injury of October 21, 1974.

Findings of Fact and Conclusions of Law

Based upon the entire record in this case, and my observation of the witnesses and their demeanor, I make the following Findings of Fact and Conclusions of Law.

The stipulations agreed to by the parties are consistent with the evidence, and I find them to be established as facts.

Issue No. 1—Jurisdiction:

Respondents assert that Employer is not subject to the jurisdiction of the Act since it has no employees engaged in maritime employment, and the functions performed by Claimant on the day of the injury were not maritime employment.

Employer was engaged in the business of weighing, sampling, and inspection of various imported commodities, including rubber, the material being handled by Claimant on October 21, 1974. Employer is hired by the importing dealers or their agents. The particular material being handled is unloaded from the ship by longshoremen and placed inside the pier. From that point Employer's personnel move the commodity in position to be weighed, after which the bale is opened by means of pry bars and a cutting instrument to be inspected. The container is reclosed by Employer's men, and then the commodity is moved by longshoremen to its ultimate destination to be accepted by the consignee. Employer's main functions are weighing, reconditioning, and sampling the commodity.

Section 2(3) of the Act defines an "employee" as a person engaged in maritime employment, including any harbor-worker, and Section 2(4) defines an "employer" as anyone who has any employee engaged in maritime employment on navigable waters, including designated adjoining areas. Compensation is paid for disability of an employee arising from an injury occurring upon navigable waters and environs. 33 U.S.C. § 903.

I find and conclude that Employer is engaged in maritime employment, and that at the time of his injury Claimant was doing likewise. It is clear that the weighing, sampling, and reconditioning of the cargo prior to delivery to the consignee is an integral and essential part of the process of unloading and movement of the commodity to the point where it is turned over the consignee. It is also clear that Claimant is a harbor-worker. *Camitros* v. *B. T. Ilsley, Inc.*, 6 BRBS 295, BRB No. 76-366 (July 15, 1977) is virtually on all fours with the case under consideration. I also find and conclude that the injury occurred on navigable waters. 33 U.S.C. § 903.

Issue No. 2—Disability:

At the time of the hearing Claimant was 48 years of age, had completed two years of high school, and had worked for Employer about 20 years.

Claimant testified that on the day he was injured he was engaged in breaking open a bale of rubber when the bale suddenly parted and the pry bar struck him in the chest. (Tr. 20, 21) George W. Anderson, a supervisor for Employer, testified that Claimant told him he didn't feel well, that he had a pain in his chest. Mr. Anderson told him to sit and rest, and later Claimant asked for an ambulance. (Tr. 38, 39)

Mr. Shaughnessy was hospitalized from October 21, 1974, to November 11, 1974, and rehospitalized January 16, 1975, for supra-ventricular tachycardia. (Respondent No. 2)

A report by the Veterans Hospital dated June 8, 1976, showed Claimant's admission on March 5, 1976, and discharge on March 29, 1976. A cardiac catheterization was performed on March 24, and the diagnosis included arteriosclerotic heart disease; coronary insufficiency; old inferior wall myocardial infarction; status post coronary by-pass August 1975; and status post cardiac catheterizations, June 1975 and March 1976. The staff physician remarked that the Claimant was "100 percent totally disabled." Mr. Shaughnessy was discharged to the Outpatient Clinic. He was again admitted May 24, 1976, and discharged May 27, 1976, to the Outpatient Clinic. (Claimant No. 3)

A report by Dr. Seymour S. Cutler dated March 2, 1977, showed he begun treating Claimant in July 1976, and that the most recent treatment was in March 1977, to continue. Dr. Cutler noted there had been 2 hospital admissions because of chest pain and premature ventricular beats. The doctor reports there is a causal connection to an occurrence, but the occurrence to which he refers is not definitely shown in the record. (Claimant No. 2)

Claimant testified that he could not lift weights of five or ten pounds because of numbness in his arms which he attributed to the bypass surgery. (Tr. 32)

I am persuaded by the evidence that Claimant is permanently totally disabled by reason of his arteriosclerotic heart disease. I am also persuaded that Claimant's heart disease is causally connected to his employment. See, e.g., *Collins* v. *General Dynamics*

Corporation, 5 BRBS 675, BRB No. 76-131 (April 5, 1977), *et al.*

Penalties and Interest:

It was stipulated that compensation was not paid until January 30, 1975, when a lump sum of $2,160.00 purported to bring the payments up to date to January 21, 1975. Penalties provided by Section 14(e) of the Act are applicable to that period for each payment not made within fourteen days after the due date, together with interest at the rate of six percent per annum.

The compensation rate is $181.33 per week based on an average weekly wage of $272.00.

It was further stipulated that payments were made on the bi-weekly (semimonthly) basis until March 7, 1977, and that no payments were subject to penalties. The evidence does not indicate otherwise. However, payments subsequent to that time are subject to penalties and interest.

Attorney Fee:

Saul C. Downes, Esquire, and Samuel S. Hyams, Esquire, have submitted a request for an attorney fee of $2,000.00. Respondents have commented thereon.

An attorney fee is payable in this matter; however, I am unable to award a fee on the basis of the application. 20 C.F.R. 702.132 *et seq.* requires the application to be supported by a complete statement of the character and extent of the work done. Time in-

crements of 15 minutes or more should be utilized. Time will be afforded.

Order

1. Respondents shall pay Claimant compensation for permanent total disability based on a compensation rate of $181.33 per week, beginning October 21, 1974, and continuing, said sums to be adjusted pursuant to Section 10(f) of the Act.

2. Respondents shall pay Claimant as additional compensation, pursuant to Section 14(e) of the Act, an amount equal to ten percent of each such payment not paid within fourteen days after due, together with interest thereon at the rate of six percent per annum computed from the date each payment became due until paid.

3. Respondent shall pay for or reimburse Claimant for the reasonable cost of such medical benefits as the nature of Claimant's injury shall require pursuant to Section 7 of the Act.

4. All payments now due Claimant shall be paid forthwith in a lump sum.

5. Respondents shall receive credit for all appropriate payments made to Claimant in this matter.

6. Claimant's counsel shall have twenty days from the date hereof to apply for an attorney fee, with a

copy to Respondents, who shall have an added ten days to comment.

/s/ Freeman C. Murray
FREEMAN C. MURRAY
Administrative Law Judge

Dated: November 14, 1977
Washington, D.C.

FCM:seg

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1329

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

WALTER TANTZEN, INC., AND INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1979

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

WALTER TANTZEN, INC., AND INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, Walter Tantzen, Inc. and Insurance Company of North America, respectfully pray that the Petition for a Writ of Certiorari be denied.

Opinions Below

The opinion of the Court of Appeals (App. A, infra 1-a) is reported at 601 F. 2d 670. The opinion of the Benefits Review Board (App. B, infra, 11-a) is not reported. The decision of the administrative law judge (App. C, infra, 25-a) is not reported.

Jurisdiction

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The jurisdictional requisites are adequately set forth in the Petition.

Statute Involved

The statute here involved is the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat 1424: 86 Stat 1251; 33 U.S.C. 901 to 950 (1976). The statute is set forth, in pertinent part, in respondent's Appendix D.

Questions Presented

1. Whether this Court, in its discretion, should agree to review a record which, according to the court of appeals which heard the case below, is so inadequately developed as to lack the factual determinations essential to the proper adjudication of the case?

2. Whether the Director, Office of Workers' Compensation Programs, United States Department of Labor, had standing to petition for a writ of certiorari in the instant matter?

3. Was the claimant engaged in maritime employment at the time he sustained his injuries?

Statement of the Case

The claimant, Thomas Shaughnessy, an employee of respondent Tantzen, Inc., was struck in the chest by a pry bar. The injury occurred on a pier in Brooklyn, New York, where the claimant was working as a scaleman (App. C, 29-a, infra).

The administrative law judge found that, as a result of his injury, the claimant was permanently and totally disabled (App. C, 30-a, infra).

Respondent-Tantzen, Inc. was engaged in the business of weighing, sampling and inspection of various imported commodities. Tantzen is hired by the importing dealers or

their agents. The particular material being handled is unloaded from the ship by longshoremen and placed inside the pier. From that point Tantzen's employees move the commodity in position to be weighed, after which the bale is opened by means of pry bars and a cutting instrument, so that it may be inspected. The container is then reclosed by Tantzen's employees and then the commodity is moved by longshoremen to its ultimate destination to be accepted by the consignee. Tantzen's main functions are weighing, reconditioning and sampling the commodity (App. C, 28-a, infra).

The order of the administrative law judge awarded compensation to the claimant pursuant to the Act. Upon appeal by the employer and its insurance carrier, the majority of the three-member Benefits Review Board concluded that the claimant "was engaged in longshoring operations" which was a "type of maritime employment within the meaning of Section 2(3) of the Act", and therefore affirmed the order of the administrative law judge (App. A, 4-a, infra).

Respondent-Tantzen, and its insurer petitioned the Court of Appeals for review of the Board's order, reciting in its brief that:

> The sole question presented is whether the claimant's injury meets the jurisdictional requirements (status) of the Act.

(App. A, 2-a, infra).

The claimant's brief and that of the Director, Office of Workers' Compensation Programs, also limited their argument to the status of the employee (App. A, 2-a, infra).

The Court of Appeals for the Second Circuit, commenting on the inadequacy of the record as presented, stated that they did not have to reach the question of the claimant's status under Section 2(3) because, based on the ab-

sence of any evidence in the record to show that any of Tantzen's employees were ever engaged in maritime employment (which the Court defined as employment seaward of the line drawn in *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 [1917]), there was no proof that the employer Tantzen was subject to the Act, and set aside the order of the Board and remanded the case for development of the record as to whether or not the claimant, or any other Tantzen employee, was engaged in maritime employment within the meaning of Section 2(3) of the Act (i.e. upon actual water) (App. A, 4-a-5-a, 6-a, infra).

The Court of Appeals suggested that, should the Board remand the case to an administrative law judge to take further evidence, it might also be appropriate to take further evidence and make more specific findings as to (1) the claimant's duties; (2) what, if any, duties longshoremen perform in connection with weighing, opening, inspecting and reconditioning the contents of bales or other packages of individual consignees; and (3) what form of report, if any, a scaleman, like the claimant, makes to the longshoremen who pick up bales when the scaleman has finished his work (App. A, 9-a, infra).

The claimant, who is represented by counsel, failed to file a petition for review of the decision of the Court of Appeals. The Director, however, has petitioned this Court for a writ of certiorari to the U.S. Court of Appeals for the Second Circuit.

Argument

A. This Court, in Its Discretion Should Deny the Petition.

The Court of Appeals did not reach the question of whether the claimant had met the statutory status requirements. It merely found that the record must be further developed in order for a proper deermination on the ques-

tion of status to be made. The Court of Appeals' primary rationale for vacating the order of the Benefits Review Board is to remand the case so that the record may be developed further. The Court of Appeals' remarks concerning the relationship between definitions of employee and employer are dicta and should be regarded as such. The record in this case is inadequate to support a meaningful conclusion of law.

Although the power of this Court to review a case on a writ of certiorari is not conditioned upon the entry of a final order, the Director's petition is addressed to the discretion of this Court. In view of the inadequacies in the record in this case, this Court, in the exercise of its discretion should deny the petition.

The opinion of the Court of Appeals discusses at footnote 5 (App. A, 5-a, infra) the need for development of the record regarding claimant's activities vis-a-vis those of the now famous Blundo. This reflects the Court of Appeals' awareness of the principles set forth by this Court in *Northeast Marine Terminals* v. *Caputo,* 432 U.S. 249, 97 S. Ct. 2348 (1977). The Court of Appeals' references to its opinion in *Fusco* v. *Perini et al.* (supra), in view of this Court's recent vacatur of the order in that case, can now be disregarded. The review by this Court of the geographical vs. the occupational determination of status under the Act, will be accomplished in *Fusco* v. *Perini et al.* (supra) where that issue is of central significance. In the case at bar, that is not the central issue, and review of that question in this case is unnecessary, and in view of the record, ill advised. The decision of the Court of Appeals setting aside the order of the Benefits Review Board and remanding the case for further development of the record is correct. This case should be remanded to the Benefits Review Board and from there to an administrative law judge so that evidence crucial to the determinations as to: (a) whether the claimant-respondent-Shaughnessy had met the status require-

ments of the Act; and (b) whether respondent-Tantzen, Inc. is an employer within the meaning of the Act, may be taken. It is clear from the decision of the Court of Appeals that the record in this case is inadequate with regard to the activities of both Shaughnessy and the other employees of respondent Tantzen, Inc. (See footnote 5 of the opinion of the Court of Appeals, App. A, 5-a, infra).

B. The Director, Office of Workers' Compensation Programs, United States Department of Labor, Has No Standing to Petition This Court for Review of the Instant Case.

Baker v. *Carr,* 396 U.S. 186; 82 S. Ct. 691; 7 L. Ed. 2d 663 (1962);

Flast v. *Cohen,* 392 U.S. 83; 88 S. Ct. 1942 (1968);

I.T.O. Corp. of Baltimore v. *Benefits Review Board,* 542 F. 2d 903 (4th Cir. 1976) (en banc) vacated on other grounds sub nom. *Adkins* v. *I.T.O. Corp.,* —— U.S. ——, 97 S. Ct. 2967, 53 L. Ed. 2d 1088 (1977);

Director, Office of Workers' Compensation Programs, United States Department of Labor v. *Donzi Marine Inc.,* 586 F. 2d 377 (5th Cir. 1978);

Fusco v. *Perini, et al.* (supra).

The Director lacks the requisite personal stake in the outcome of this case.

> The emphasis in standing problems is on whether the party invoking federal court jurisdiction has a "personal stake in the outcome of the controversy", Baker v. Carr (supra), and whether the dispute touches upon the legal relations of the parties having adverse legal interests. Aetna Life Insurance Co. v. Haworth, 300 U.S. 27, 240, 241, 57 S. Ct. 461, 464; 81 L. Ed. 617 (1937).
>
> *Flast* v. *Cohen* (supra).

The Director has failed to demonstrate the requisite adverse interests. He is not an aggrieved party within the meaning of 33 U.S.C. 921(c). *Director, Office of Workers' Compensation Programs, United States Department of Labor* v. *Donzi Marine, Inc.,* 586 F. 2d 377 (5th Cir. 1978). This is not to say that the Director can never be an aggrieved party under 33 U.S.C. 921(c). In several cases under the Black Lung Act, which derives its provisions on judicial review by incorporation by reference of the provisions of 33 U.S.C. 921(c), the courts of appeal have discussed the question of the Director's status. Clearly when, as in certain Black Lung cases, the U.S. Government can be held liable for the payment of benefits, the Director has standing to represent the financial interest of the government. *I.T.O.* v. *B.R.B.* (supra) at 907, note 4. However, absent the showing of some interest or stake in the outcome, the Director is not a party aggrieved under 33 U.S.C. 921(c), as amended, which provides in pertinent part as follows:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order . . .

Under the statute, the Director must demonstrate that he is a party aggrieved within the meaning of the statute. He has not so demonstrated in the case at bar. *Donzi Marine* (supra).

The question of the Director's standing has been considered by various courts of appeal. Even where the courts have held that the Director has standing, they have acknowledged that the Director must have some concrete stake in the outcome.

Director, Office of Workers' Compensation Programs, United States Department of Labor v. *Peabody Coal,* 554 F. 2d 310 (7th Cir. 1977);

Director, Office of Workers' Compensation Programs, United States Department of Labor v. *Alabama By Products Co.*, 560 F. 2d 710 (5th Cir. 1977);

Director, Office of Workers' Compensation Programs, United States Department of Labor v. *National Mines Corp.*, 554 F. 2d 1267 (4th Cir. 1977).

In *I.T.O. Corp.* v. *Benefits Review Board* (supra), the majority held that the Director lacks standing to respond to a petition to review an order of the Benefits Review Board awarding compensation to a longshoreman. The court reasoned that the Director lacked sufficient stake in the outcome having failed to allege any injury in fact, economic or otherwise.

In *Krolick Contracting Corp.* v. *Benefits Review Board, United States Department of Labor,* 558 F. 2d 685 (3rd Cir. 1977), cert. denied sub nom. *Maritime Terminals* v. *Brown,* —— U.S. ——; 97 S. Ct. 2972, the court held that, in a Black Lung case where the federal government has secondary liability, the Director has standing. The Court of Appeals did not reach the question as to whether the same would be true for other benefit programs under the Longshoremen's and Harbor Workers' Compensation Act.

The 7th Circuit, in *Director* v. *Peabody Coal* (supra), at 332, granted the Director standing but specifically restricted its holding to the unique circumstances of that case.

In *Director* v. *National Mines Corp.* (supra), a Black Lung case, the 4th Circuit distinguished *I.T.O. Corp.* v. *Benefits Review Board* (supra) and held that the Director had standing to seek review because the government had a direct economic interest in the outcome. In *Director* v. *Eastern Coal Company,* 561 F. 2d 632 (6th Cir. 1977), the 6th Circuit held that the Director had standing but acknowledged the requirement of adversity. (That case involved a dispute between the Director and coal companies over who should be responsible for the payment of benefits):

> We hold that there is ample adversity present in our instant litigation to make the Director an adverse party litigant.

Director v. *Eastern Coal* (supra), at 632, 549.

In *Director* v. *Donzi Marine* (supra), the Court of Appeals for the 5th Circuit held that the Director lacked standing, having failed to show an interest on his part, either pecuniary or administrative, which was adversely affected by the order of which he sought review.

In *Director* v. *Alabama By Products* (supra), at 717, a Black Lung case, the Court of Appeals for the Fifth Circuit specifically restricted its holding that the Director had standing:

> We hold only that under the unusual circumstances of this case, when an adverse determination would force the Director to expend resources to readjudicate many Black Lung claims, or when no final resolution would leave the administration of the transition phase of the program in a limbo of uncertainty, the Director's interests as administrator of the Black Lung program are sufficiently bound up with the case at bar that he must be granted standing to appear as petitioner.

In the case at bar, the Director has failed to demonstrate any concrete interest, either financial or administrative, which is adversely affected so as to confer standing upon him. *Director* v. *Donzi Marine* (supra). The Director clearly has no economic interest in the case at bar. No allegation has been made that there should be a claim for

benefits under Section 908(f) or Section 944 of the Act. Any liability for the payments of benefits will fall upon the respondent-employer-Tantzen, Inc. and thus upon its insurance carrier, respondent-Insurance Company of North America. The Director's responsibility for the development and operation of administrative machinery for the handling of the claims under the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., is a general and continuing responsibility. This responsibility exists independent of the outcome of any given individual case, and there is nothing in the record to suggest that the outcome of the case at bar has any impact on the Director's general administrative interest. Section 939(c) of the Act provides in pertinent part as follows:

> (c) (1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation, including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower and vocational rehabilitation services and assist such employees in obtaining the best such services available.

This provision cannot be invoked in support of the Director's claim of standing in the case at bar. The claimant in this case is represented by counsel. There is no indication that either the claimant or his attorney requested the assistance of the Director. Absent such a request, the Director's interest in the case at bar is the same as it is in every case (a general interest in the just administration of the Act) and is not particularized enough to give him standing in every individual case. The Director's responsibilities to individuals covered under the Act should

be fulfilled through his general administrative role, regardless of the outcome of any given individual case.

Whatever administrative interest the Director may have in the proper administration of the Longshoremen's and Harbor Workers' Compensation Act and the proper adjudication of the cases thereunder, is well protected by this Court's grant of certiorari in *Fusco* v. *Perini et al.* (supra). According to the Director's petition, the two cases are similar. The Director's interest, therefore, is similar in each case. The claimant in the case at bar is represented by counsel, and consequently the Director cannot rely on his duty of assistance to the claimant to give him standing here.

The Director has no financial interest and he has no administrative interest different from that on which he bases his claim of standing in *Fusco* v. *Perini et al.* (supra), and consequently, he has no standing in the case at bar.

Because the Director has no interest at stake, he does not present this Court with an actual case or controversy as required by Article III of the Constitution. *Flast* v. *Cohen* (supra); *Muskrat* v. *U.S.*, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911).

C. Claimant-Shaughnessy Was Not Engaged in Maritime Employment at the Time of His Injury.

Respondents Tantzen and Insurance Company of North America, grounded their petition for review of the order of the Benefits Review Board on the sole issue of claimant-Shaughnessy's status within the purview of 33 U.S.C. 901 et seq. (LHCA).

They therein pointed out that it was the legislative intent to provide coverage under the Act for every individual injured in the geographically expanded situs

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing

> or building a vessel just because they are injured in an area adjoining navigable waters used for such purpose. Those employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. S.Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R.Rep. No. 92-1941, 92d Cong., 2d Sess. 1972 U.S. Code Cong. & Admin. News.

Section 902(3) defines an employee as a person engaged in maritime employment and includes any longshoreman or other person engaged in longshoring operations and any harbor worker, including ship repairmen, ship builders or ship breakers.

Section 903(a) provides for the payment of compensation in consequence of injuries or death which are attendant upon accidents occurring upon the navigable waters of the United States. The term navigable waters encompasses adjoining piers, wharves, drydocks, terminals, building ways, marine railways, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.

Section 903 has been interpreted as requiring the placement of an employee on a covered situs. Section 902(3) is commonly accepted as mandating work in maritime employment and thereby attaining a status.

In this connection, the only change accomplished by the 1972 amendments was a geographical enlargement of the covered situs. The primary reason for the extension of situs was to remove the employee from the uncertainty of being alternately covered and uncovered in the performance of his daily tasks, as he moved from a vessel to land and land to a vessel.

In a recent decision, this Court has approved the landward extension of a covered situs to encompass a warehouse adjacent to a pier.

> *P. C. Pfeiffer Co.* v. *Ford,* No. 78-425—November 27, 1979.

In doing so however the Court reemphasized the necessity for the employee to also have the requisite status as a martime ployee. The crucial factor is the nature of the work to which an employee may be assigned.

In the instant matter it is clear, even from this deficient record, that Shaughnessy could never be assigned to load or unload a vessel.

Historically he never performed such function even prior to the 1972 amendments.

By the very nature of his work and the equipment required in the performance of same, he and others like him were never aboard vessels. His work effort as a scaleman is not commenced until cargo is deposited at the inspection point, by longshoremen. After the inspection process is completed, only longshoremen may remove the cargo and precipitate it on its way to the ultimate consignee. There is some evidence that work rules imposed as a result of contractual negotiations would, under any circumstance, prohibit a scaleman like Shaughnessy from assisting in the process of loading or unloading.

As the dissenting Board member, Chairman Smith, pointed out:

> The employer acts always as agent for Goodyear, Firestone, Uniroyal and other land-based consignees. The claimant handled cargo solely to protect those consignees' interests by ascertaining, before acceptance, the quality and condition of the cargo; he did not handle it in order to further its progress through the

> stream of maritime commerce. Claimant's position is therefore legally indistinguishable from that of a consignee's outside trucker who picks cargo up on the pier for shipment by land. Northeast Marine Terminal Co. v. Caputo, 438 U.S. 249, 267 (1977); Sea Land Service Inc. supra at 637, 638. This because the amended definition of navigable waters is less a delineation of a geographical area than a means of expressing the relationship of dockside activities to maritime transport.

It is obvious therefore that Chairman Smith in reliance upon *Maher Terminals* v. *Farrell,* 548 F. 2d 475 (3rd Cir. 1977) and *Sea Land Service, Inc.* v. *Director, OWCP and Jones,* 540 F. 2d 629 (3rd Cir. 1976), concentrated on the primary duties of the claimant.

His evaluation of such duties compelled the conclusion that status was not attained.

The instant employer and his employees are there to protect the interest of the consignee and not to facilitate the movement of cargo.

It would appear that the code to unscrambling the perpetuation of confusing terminology lies in mandatorily associating the employee with the historical determination of maritime employment.

In order for an employee to be vessted with the raiment of maritime employment, his work activity must be the kind that was performed prior to the 1972 amendments upon actual as opposed to now legislatively defined navigable waters.

A traditional and actual nexus with the sea still remains the sine qua non before the Act becomes operational. The extension of the covered situs does not carry with it an automatic status.

To hold otherwise would render the legislative disclaimer of coverage to anyone upon the expanded situs, meaningless.

For those whose work has only peripheral reference to maritime employment, the remedy is with a State. These individuals never functioned aboard a vessel upon navigable waters and even though they work upon the expanded situs, coverage does not attach.

The Second Circuit Court of Appeals tentatively approached that concept when it noted:

> There is no showing that Shaughnessy (claimant) or any other Tantzen (employer) employee ever spent any part of any working day seaward of the Jensen line.

The 1972 amendments did nothing more than transfer status to the land area only for those whose Federal remedy was abruptly terminated when they departed a vessel afloat upon navigable water or did not commence until they had reached such a vessel.

Assuming arguendo that an occupational rather than a geographical nexus be the guiding principle, scalers and weighers do not come within the purview of the Act. Their activities are not an integral part of the unloading process. They are merely peripheral actors and stand in no better position than the principal (consignee), who at times is present upon a pier, but who could not be considered to be engaged in maritime employment.

The purpose of the weigher to ascertain weight and quality of various goods is not a traditional maritime function ever performed aboard a vessel. Indeed, these individuals may not move cargo except for the very limited purpose of weighing it and noting its quality. They may not halt the unloading process, and their activities are to a large degree governed by the actions of

the longshoremen. They are not employees of the stevedoring company, and their function is not an intermediate step in the movement of cargo between ship and land transportation since it is directed to an end entirely different from the unloading process.

CONCLUSION

For the foregoing reasons, the petition of the Director, Office of Workers' Compensation Programs, for a Writ of Certiorari, should be denied.

Respectfully submitted,

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Croton-on-Hudson, New York 10520
Attorney for Respondents
Walter Tantzen, Inc., and Insurance Company of North America

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 949, Docket 79-4034

WALTER TANTZEN, INC., and INSURANCE COMPANY OF NORTH AMERICA, PETITIONERS

v.

THOMAS SHAUGHNESSY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

Argued April 30, 1979

Decided June 29, 1979

Joseph F. Manes, New York City, for petitioners-appellants.

Saul C. Downes, Rowen, Downes, Cascione & Chechanover, New York City, for respondent-appellee.

Carin Ann Clauss, Laurie M. Streeter, Mary A. Sheehan, U.S. Dept. of Labor, Washington, D.C., for party in interest.

Before GURFEIN and MESKILL, Circuit Judges, and WYZANSKI, Senior District Judge.*

WYZANSKI, Senior District Judge:

An employer and its insurer petition us to review the December 29, 1978 order of the Benefits Review Board, [BRB], United States Department of Labor affirming the order of the administrative law judge

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* Of the District of Massachusetts, sitting by designation.

[ALJ] awarding compensation to Thomas Shaughnessy [hereinafter "claimant"] pursuant to the Longshoremen's and Harbor Workers' Compensation Act. 44 Stat. 1424; 86 Stat. 1251. 33 U.S.C. §§ 901-950 (1976) [LHWCA].

The petition assigns no specific error. (App. 1a). Petitioners' brief (p. 2), reciting that "the sole question presented is whether the claimant's injury . . . meets the jurisdictional requirements (status) of the Act," discusses only whether plaintiff was an "employee" within § 2(3) of the LHWCA, 33 U.S.C. § 902(3).[1] The employee question is also the only issue discussed by respondents' briefs. However, as will appear, we are of the opinion that we cannot avoid another question—whether the respondent Walter Tantzen, Inc. was an "employer" within § 2(4) of LHWCA, 33 U.S.C. § 902(4).[2]

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[1] The relevant statutory section defining "employee," with italics indicating the material added to the original statute by 1972 amendments, 86 Stat. 1251, 33 U.S.C. § 902(3) (1970 ed., Supp. V) provides:

> The term 'employee' *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term* does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

[2] "Employer" was defined in 33 U.S.C, § 902(4):

> The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States [including any dry dock].

The ALJ made the folowing brief findings[3] as to the nature of the employer's business and of the claimant's work:

> Employer was engaged in the business of weighing, sampling, and inspection of various imported commodities, including rubber, the material being handled by Claimant on October 21, 1974. Employer is hired by the importing dealers or their agents. The particular material being handled is unloaded from the ship by longshoremen and placed inside the pier. From that point Employer's personnel move the commodity in position to be weighed, after which the bale is opened by means of pry bars and a cutting instrument to be inspected. The container is reclosed by Employer's men, and then the commodity is moved by longshoremen to its ultimate destination to be accepted by the consignee. Employer's main functions are weighing, reconditioning, and sampling the commodity.

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[3] We deprecate the course followed by the BRB in supplementing the ALJ's findings with its own findings, especially on contested matters. Congress provided that "the findings of fact [by the ALJ] in the decision under review by the [Benefits Review] Board shall be conclusive if supported by substantial evidence in the record considered as a whole." § 21(b)(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921(b)(3) (Supp. III, 1973). *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir 1976); *Potenza* v. *United Terminals*, 524 F.2d 1136, 1137 (2nd Cir. 1975). If additional findings are necessary the BRB may "remand a case to the administrative law judge" to make additional findings. § 21(b)(4) of the LHWCA; 33 U.S.C. § 921(b)(4). Except with respect to uncontested matters, the BRB is not entitled to make its own findings of fact, nor are we.

On the basis of his limited findings the ALJ stated that:

> I find and conclude that Employer is engaged [sic] in maritime employment, and that at the time of his injury Claimant was doing [sic] likewise. It is clear that the weighing, sampling, and reconditioning of the cargo prior to delivery to the consignee is [sic] an integral and essential part of the process of unloading and movement of the commodity to the point where it is turned over to the consignee.

Accordingly, the ALJ entered a compensation order for claimant.

Upon appeal by the employer and its insurer, a majority of three members of the BRB concluded that the claimant was "engaged in longshoring operations" within the meaning of § 2(3) which was a "type of maritime employment within the meaning of § 2(3) of the Act" (App. 17a. Compare App. 15a) and, therefore, the BRB entered its December 29, 1978 order affirming the ALJ's order.

We do not find it necessary on this inadequate record [4] to decide whether Shaughnessy was indeed

[4] The inadequate record makes it difficult, if not impossible, to know what duties longshoremen customarily perform. We repeat the suggestion of Judge Friendly in *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 47 (2nd Cir. 1976), approved on appeal by the Supreme Court, *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 272-273, note 34, 97 S.Ct. 2348, 53 L.Ed.2d 320, that the BRB prepare a study of what work longshoremen perform. We, apparently like Judge Friendly and Mr. Justice Marshall, would regard it as appropriate for the BRB, even though it is not a fact-finding body (see 33 U.S.C. § 21(b)(3)) and has only review functions, to use such a study in later reviews of orders of ALJ's. This would amount to an exercise of judicial notice with respect to facts "either generally known," or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." This would be in accordance with Fed.R.Evidence 201(a), which, although not controlling BRB or other tribunals acting in an appellate capacity, as is evident from Fed.R.Evidence 1101, nonetheless sets a standard appropriate for an appellate tribunal which contemplates taking judicial notice of any matter. *United States* v. *Cassom*, 140 U.S.App.D.C. 141, 148, 434 F.2d 415, 422 (1970).

"engaged in longshoring operations." [5]

[5] On the record as it now stands we cannot tell whether Shaughnessy's case is distinguishable from Blundo's case decided in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Blundo in opening containers, checking the contents, stripping from the containers the cargo, marking the separate shipments destined for different consignees, and placing those shipments in a bonded warehouse was performing in a new setting work which was the *functional equivalent* of what longshoremen had previously done. It was for that reason that the Court held that Blundo was engaged in longshoring operations. *Ibid.*, pp. 270-271, 97 S.Ct. 2348. Until we know more about what longshoremen customarily do we cannot tell whether there is a similar equivalency with respect to Shaughnessy's duties in weighing bales which belong to an individual consignee, opening them, inspecting them, reconditioning their contents, and reclosing them. Obviously, what Shaughnessy does is directed at the weighing of a particular consignee's shipment and the inspection and reconditioning of its contents, and we are uninformed as to what longshoremen do with respect to individual shipments.

Moreover, the present findings of the ALJ do not show clearly whether after Shaughnessy has finished his inspection he, in effect like a switchman, directs a gang of longshoremen

An examination of the record reveals no evidence that Shaughnessy or any other employee of Tantzen was ever upon actual, as distinguished from statutorily defined, navigable waters of the United States (hereinafter sometimes called "actual water"). Nor do either the ALJ or the BRB say that Shaughnessy or any other employee of Tantzen was on actual water. What they do say or imply is that the fact that Shaughnessy was engaged in longshoring operations means that he was in maritime employment" within the meaning of both § 2(3) and § 2(4) and that it follows that Tantzen was an employer within § 2(4). In our opinion, this reasoning involves a *nonsequitur*, a misconstruction of § 2(3), an incorrect interpretation of the term "maritime employment" as used in both § 2(3) and § 2(4), a misapplication of the cases holding that once it has been determined that a claimant is engaged in "maritime employment" it follows that his employer is an employer within § 2(4), and a result squarely contrary to a declared Congressional purpose.

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whether to take the bales to the consignee's truck or to take them to a storage warehouse.

In pointing to these *lacunae*, we have not indicated whether we agree with Shaughnessy's contention and the BRB's view that the word "engaged" in the phrase "engaged in longshoring operations" means merely "directly involved." See *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137 (9th Cir. 1978); *Texports Stevedore Co.* v. *Winchester*, 554 F.2d 245, 247 (5th Cir.), *second pet. for rehearing on other grounds granted*, 569 F.2d 428 (1978); *J. A. McCarthy, Inc.* v. *Bradshaw*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 433 U.S. 905, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *adhered to on reconsideration*, 564 F.2d 89 (3d Cir. 1977).

In *Fusco et al.* v. *Perini et al.*, —— F.2d —— (2nd Cir. 1979) we explained that, as used in § 2(3), the phrase a "person engaged in maritime employment" is to be read geographically as meaning a person engaged in employment upon actual water. When § 2(3) defines "employee" as "any person engaged in maritime employment, including any longshoreman," § 2(3) uses the word "including" inexactly; as there used "including" means "as well as." § 2(3) does not say, what obviously is not the case, that every longshoreman is engaged in employment upon actual water. Hence the *mere* fact that employment in longshoring operations is a type of employment within § 2(3) does *not* make it a type of "maritime employment" as those two words are used in § 2(3).

Nor is employment in longshoring operations on land "maritime employment" as that term is used in § 2(4). As *Fusco* v. *Perini*, *supra*, details at length, and as *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962) finally settled, the term "maritime employment" as used in § 2(4) means employment seaward of the line drawn by *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). There is no showing that Shaughnessy or any other Tantzen employee ever spent any part of any working day seaward of the *Jensen* line.

The cases to which the BRB refers, such as *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977) and *Handcor Inc.* v. *Director*,

568 F.2d 143, 144 (9th Cir. 1978), and cases like *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 529 F.2d 1080, 1083 (4th Cir. 1975), *modified en banc on other grounds*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded sub nom. Adkins* v. *I.T.O. Corp. of Baltimore*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *rev'd on remand on other grounds*, 563 F.2d 646 (1977), as well as texts such as 4 Larson, Workmen's Compensation Law (1979) § 89.27 p. 16-178, and Gilmore and Black, The Law of Admiralty (2d ed., 1975), p. 429, lines 14-16, which indicate that once the claimant's status as an "employee" is established the employer automatically becomes an "employer" failed to consider the problem presented by the instant case—where a worker claims the status of a statutory § 2(3) "employee" because he is a longshoreman but is not himself in maritime employment. What those authorities say about the claimant's proving that his employer is a statutory § 2(4) employer by proving that he is a § 2(3) employee is true if and only if the employee also proves that he is employed over actual water.

That the foregoing statement is sound is convincingly shown by the Congressional Committee Reports which accompanied the 1972 amendments to the 1927 LHWCA. See, S.Rep.No.92-1125, 92 Cong. 2 Sess. (1972) and H.R.Rep.No.92-1441, U.S.Code Cong. & Admin.News 1972, p. 4698. The Committees were explicit in their intention to exclude from LHWCA liability any employer who had no employees on actual water:

> Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters. S.Rep. 15; H.R. Rep. 11.

Although we must set aside the BRB's December 29, 1978 order because there is no proof that the employer Tantzen is subject to the LHWCA, we, in remanding the case, leave the BRB free in its turn to remand the case to an ALJ to hear any evidence that shows that in fact Shaughnessy or any other Tantzen employee was employed in maritime employment in the sense of employment upon actual water. Such a reopening of the case may seem fair in view of a misunderstanding so generally shared in this case by all, and not even exposed in the briefs or at the oral argument.

If the case is re-opened it might be appropriate to take further evidence and to make more specific findings as to (1) Shaughnessy's own duties, (2) what, if any, duties longshoremen perform in connection with weighing, opening, inspecting, and reconditioning the contents of bales or other packages of individual consignees, and (3) what form of report, if any, a scaleman like Shaughnessy makes to the long-

shoremen who pick up bales when the scaleman has finished his work.

Petition granted.

The December 29, 1978 Benefits Review Board order is set aside and the case is remanded to the Benefits Review Board for further proceedings not inconsistent with this opinion.

APPENDIX B

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

[SEAL]

BRB No. 78-133

[Filed as part of the record—Dec. 29, 1978—
Agnes Kurtz, Clerk, Benefits Review Board]

THOMAS SHAUGHNESSY, CLAIMANT-RESPONDENT

v.

WALTER TANTZEN, INC.

and

INSURANCE COMPANY OF NORTH AMERICA,
EMPLOYER/CARRIER PETITIONERS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PARTY-IN-INTEREST

DECISION

Appeal from the Decision and Order of Freeman C. Murray, Administrative Law Judge, United States Department of Labor.

Saul C. Downes (Rowen, Downes, Cascione & Chechanover), New York, New York, for the claimant.

Joseph F. Manes, Croton-on-Hudson, New York, for the employer/carrier.

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Wash-

ington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman, MILLER and KALARIS, Members.

MILLER, Member:

This appeal by the employer/carrier (hereinafter, the employer), from a Decision and Order (77-LHCA-597) of Administrative Law Judge Freeman C. Murray, is brought pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter, the Act).

The claimant, a member of Scaleman's Local 935, International Longshoremen's Association, was struck in the chest on October 21, 1974, by a forty-pound pry bar with which he was helping to open a half-frozen bale of rubber weighing approximately 245 pounds. Claimant was working at the time on a pier in Brooklyn, about twenty feet from the water's edge. He was hospitalized from the day he was struck until November 11, 1974, as well as several times thereafter. In a report dated June 8, 1976, a Veterans Administration Hospital staff physician rated the claimant as "100% totally disabled." The claimant, when injured, was in his late forties and had worked for the employer off and on for about twenty years. Since being injured, claimant has undergone coronary bypass surgery and has not worked.

At the hearing, claimant and employer stipulated to the employer-employee relationship; the injury; that the injury arose out of and in the course of employment; notice; timely filing of the compensation claim; average weekly wage of $272; voluntary payment of compensation for temporary total disability from October 21, 1974, through March 7, 1977; that employer had not paid for medical services pursuant to Section 7 of the Act, 33 U.S.C. § 907; and that claimant has not returned to his regular employment.

The administrative law judge found claimant to be permanently, totally disabled by arteriosclerotic heart disease connected with his employment. He then held that the claim came under the Act, and accordingly awarded the claimant compensation for permanent total disability in the amount of $181.33 per week, to be adjusted pursuant to Section 10(f) of the Act, 33 U.S.C. § 910(f). The administrative law judge also ordered the employer to pay additional compensation pursuant to Section 14(e) of the Act, 33 U.S.C. § 914(e), with interest at six percent per annum from the due date of each overdue payment, as well as medical benefits pursuant to Section 7 of the Act.

The employer appeals the administrative law judge's determination that the claim comes within the jurisdiction of the Act. The Board is limited to determining whether the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational, and are other-

wise consistent with applicable law. If so, they must be affirmed. 33 U.S.C. § 921(b)(3); *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965). We affirm the Decision and Order of the administrative law judge.

For this claim to be compensable under the Act, the jurisdictional "situs" and "status" requirements must be met. First, the claimant must be injured over the navigable waters of the United States. 33 U.S.C. § 903(a). The employer concedes that claimant was injured on a situs covered by the Act.

The second requirement is that the claimant have the status of a statutory employee. Section 2(3) of the Act, 33 U.S.C. § 902(3), defines this as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker. . . .

The employer maintains that claimant is not an employee within the meaning of the Act, because his job of inspecting break-bulk cargo is not maritime employment. The employer argues also that, because it has no control over the movement of cargo, it is not a statutory employer.

Section 2(4) of the Act, 33 U.S.C. § 902(4), provides that

> the term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States. . . .

The Act does not provide that, in order to be a statutory employer, one must have control over the movement of cargo. Statutory status as an employer results from having an employee who is engaged in maritime employment. We need therefore consider claimant's employment activities only. If these can be characterized as maritime employment, the employer is thereby brought within the purview of Section 2(4). *Accord*: *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Kelley* v. *Handcor, Inc.*, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978), *aff'g* 1 BRBS 319, BRB Nos. 74-165 & 74-165A (Feb. 28, 1975); *Jacksonville Shipyards* v. *Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1976), *vacated and remanded sub nom. Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), *reaffirmed*, 575 F.2d 79 (5th Cir. 1978); *Carroll* v. *Hullinghorst Industries, Inc.*, 7 BRBS 538, BRB No. 76-500 (Jan. 22, 1978); *Harris* v. *Maritime Terminals, Inc.*, 1 BRBS 301, BRB No. 74-178 (Feb. 3, 1975).

The sole business of the employer in this case is to weigh, sample, test, inspect and, when necessary, recondition imported commodities such as rubber, coffee, cocoa, and tin. The employer is hired for this purpose by domestic consignees of the commodities. Most of the time, the claimant worked with rubber. Longshoremen off-load the commodities from ships

and bring them to where they are to be weighed and sampled. On rare occasions this can be some distance from the water, but usually the weighing is done in the pier as closely as possible to the off-loading point and very shortly after cargo is deposited there. Frequently, scalemen themselves remove cargo from the sling and transport it from off-loading point to pier. Claimant testified that "nine times out of the ten, we'll unhook the nets from the crane because they haven't got enough men or the facilities to do it." The inspection and sampling is done soon after off-loading, sometimes within twenty minutes.

The employer also reconditions commodities which have been damaged in transit, by drying dampened bales, for instance, and by removing wood splinters which have become embedded in bales of rubber. When such reconditioning is necessary, claimant and his fellow workers hand-truck the bales fifty or one hundred [*sic*; the Board's opinion appears to contain an omission at this point] finished weighing, inspecting, or otherwise handling a given shipment, they report on its condition to an agent of the consignee. This ends the employer's involvement with the cargo. It can be as many as five days thereafter before longshoremen remove the bales from the weighing point for transfer to a land-based form of transportation.

Although Congress, when enacting the "status" requirement, did not define "maritime employment," "longshoreman," or "longshoring operations," the Senate and House Committee reports give some guidance.

> The committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. . . . However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08, quoted in *Northeast Marine Terminal Co., supra*, note 27. Longshore checking includes noting damage sustained by cargo during shipping. *Dictionary of Occupational Titles*, Third Edition, 1965, Vol. I, at 119. The work of scalemen such as claimant is analogous to aspects of longshore checking and is so closely related to the process of unloading as to be an integral part of it.

There is, moreover, no question that removing cargo from slings and trucking it to the pier are longshoring operations, and therefore maritime employment. The record indicates that longshoremen are by contract supposed to do it. Longshoremen injured while engaged in this activity would be covered by the Act: 33 U.S.C. § 902(3); scalemen or weighers do that same work. The record indicates also that it is the nature of break-bulk cargo, and the exigencies of shipping it by sea, which necessitate the type of inspection and reconditioning provided by employer's personnel. We think that the maritime nature of the work is clear.

When claimant dealt with cargo, it was unquestionably in the stream of maritime rather than land commerce. "The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter. . . . The line should still be drawn where cargo is delivered to a segregated place for delivery to the next mode of transportation." *Sea-Land Service, Inc.* v. *Director, OWCP and Johns*, 540 F.2d 629, 639 (3d Cir. 1976). Claimant regularly worked on the pier and on the stringpiece, close to the water and well away from the line drawn in *Johns*.

The claimant, in addition, actually handled the break-bulk cargo, hand-trucking it as necessary, moving it on and off the scales, and so forth. This distinguishes him from "purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo . . . ," whom the Senate and House Committees did not intend to cover. *Northeast Marine Terminal Co., supra*, note 27. It distinguished him likewise from the claimant in *Maher Terminals Inc.* v. *Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), *rev'g* 3 BRBS 42, BRB No. 75-183 (Dec. 10, 1975), which denied benefits under the Act to a marine terminal office clerk whose principal duty was to examine documents presented by outside truckers. Although cargo was evidently in maritime commerce when he was concerned with it, the clerk in

Farrell did not handle it, and was therefore held by the Third Circuit to be outside the coverage of the Act.

It is well established also that although a claimant does not actually load, unload, or transport maritime cargo, his or her employment duties come within the scope of maritime employment if they are found to be essential to the movement of maritime cargo. It has been so held, for instance, in the case of waterfront mechanics who maintain equipment used in longshoring operations. *Bradshaw* v. *J.A. McCarthy, Inc.*, 3 BRBS 195, BRB Nos. 75-209, 209A, and 209B (Jan. 26, 1976), *petition for review denied*, 547 F.2d 1161 (3d Cir. 1977), *vacated and remanded*, 97 S.Ct. 2967 (1977), *aff'd mem.* 564 F.2d 89 (1977). *See also Jameson* v. *Marine Terminal Corp.*, 6 BRBS 424, BRB No. 76-275 (Aug. 11, 1977); *Slee* v. *Sea-Land Service, Inc.*, 6 BRBS 291, BRB No. 76-350 (July 5, 1977); *Thompson* v. *Oceanic Containers Service, Inc.*, 5 BRBS 831, BRB No. 76-294 (May 12, 1977). The U.S. Court of Appeals for the Ninth Circuit, affirming the Board, has applied this principle in the case of a gear lockerman who inspected, maintained, refueled, and repaired stevedoring equipment, and transported it between the locker and the dock: the lockerman's function was an "integral and essential part of the overall longshoring operations." *Brady-Hamilton Stevedore Co.* v. *Herron*, No. 75-1535 (8th Cir. Jan. 23, 1978), 7 BRBS 409, 410, *aff'g* 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975).

The principle is applicable here, as well. It is the scalemen's report which clears the way for the consignee's acceptance. The scalemen's inspection activities are therefore essential to the movement of maritime cargo from the vessel toward the point of transshipment to a land-based mode of transport. Claimant's employment is consequently a part of the overall longshoring operations, and thus a type of maritime employment within the meaning of Section 2(3) of the Act.

We do not think that claimant's status as a consignees' agent affects his status as a statutory employee. The record shows that it is the consignee who, after accepting, arranges for longshore personnel to take the inspected cargo from the weighing point to the point of transshipment. We do not doubt that the longshoremen effecting this further movement of the cargo do so as the consignee's agents, and we do not doubt that they are covered under the Act. *Cf. Northeast Marine Terminal Co. supra.*

We are enjoined so to interpret the Act as to avoid "harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328 (1953). Discussing maritime workers injured on a shoreside "situs," the Supreme Court has observed that "The language of the [Act] is broad and suggests that we should take an expansive view of the . . coverage. Indeed, such a construction is appropriate for this remedial legislation." *Northeast Marine Terminal Co., supra*, at 264. Our Decision that claimant is an employee within the meaning of

Section 2(3) of the Act accords with this policy. To hold otherwise would open a gap in the Act's shoreward coverage excepting claimant and similar workers, while protecting other shoreside workers who handle cargo still moving in the stream of maritime commerce from vessel to point of transshipment.

We hereby affirm the Decision and Order of the administrative law judge.

/s/ Julius Miller
JULIUS MILLER
Member

I Concur:

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Member

Dissent of SMITH, Chairman, to follow.

Dated this 29th day of December 1978.

SMITH, Chairman, Dissenting:

I respectfully dissent from the decision of the majority.

When Congress in 1972 amended Section 3(a) of the Act, 33 U.S.C. § 903(a), to include in the definition of navigable waters ". . . any pier, wharf . . . terminal . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel," it did not intend thereby to provide benefits under the Act for every worker injured on a newly-covered situs.

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 4707-08, quoted in *Sea-Land Service, Inc.* v. *Director, OWCP and Johns*, 540 F.2d 629 (3d Cir. 1976). For coverage under the Act, Congress therefore required that a claimant be injured on the situs, and that he have

the status of an employee, that is, a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. . . ." 33 U.S.C. § 902(3). The activities of the employer and the claimant in this case both lack the maritime nexus necessary to found appropriate status under the Act.

The employer acts always as the agent for Goodyear, Firestone, Uniroyal, and other land-based consignees. The claimant handled cargo solely to protect those consignees' interests by ascertaining, before acceptance, the quality and condition of the cargo; he did not handle it in order to further its progress through the stream of maritime commerce. Claimant's position is therefore legally indistinguishable from that of a consignee's outside trucker who picks cargo up on the pier for shipment by land. The trucker, although injured over navigable waters, is not intended to be covered under the amended Act. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 267 (1977); *Sea-Land Service, Inc.*, *supra* at 637, 638. This is because the amended definition of navigable waters is less a delineation of a geographical area than a means of expressing the relationship of dockside activities to maritime transport.

> The reference in §§ 902(4) and 903(a) to the navigable waters of the United States should be regarded [as] no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus.

Sea-Land Service, Inc., supra at 638. There is no jurisdiction under the Act if the maritime relationship is not established.

The committee reports' examples of workers not covered under the amended Act indicate that the touchstone for longshore employment is whether a claimant is required "to participate in the loading or unloading of cargo" or is "directly involved in the loading or unloading functions." *Sea-Land Service, Inc., supra* at 637, 638. The claimant here is neither directly involved in unloading operations nor indirectly involved. Those operations would be unaffected by the absence of scalemen such as claimant. Claimant handles cargo to facilitate inspecting operations only. His employment activity is oriented toward the demands of land commerce exclusively. He is therefore not engaged either in longshoring operations, or in maritime employment within the meaning of Section 2(3) of the Act. I would reverse.

/s/ Samuel J. Smith
SAMUEL J. SMITH
Chairman

APPENDIX C

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

[SEAL]

Case No. 77-LHCA-597

OWCP No. 2-37667

IN THE MATTER OF

THOMAS SHAUGHNESSY, CLAIMANT

v.

WALTER TANTZEN, INC., EMPLOYER

and

INSURANCE COMPANY OF NORTH AMERICA, CARRIER

Saul C. Downes, Esquire
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For the Claimant

Joseph F. Manes, Esquire
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For the Employer
and Carrier

Carin Ann Clauss, Solicitor of Labor
Laurie M. Streeter, Associate Solicitor
Linda L. Carroll, Esquire
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For the Director,
OWCP

BEFORE: FREEMAN C. MURRAY
Administrative Law Judge

DECISION AND ORDER

Jurisdictional and Procedural History

This is a claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. 901 *et seq.*

Stipulations

It is stipulated and agreed by and between the parties that at all times pertinent to this case that (Tr. 5-7):

1. Claimant and Employer were in an employee-employer relationship.

2. The injury occurred on October 21, 1974.

3. The injury arose out of and in the course of the employment.

4. Employer had timely notice of the injury.

5. Claimant filed a timely claim for compensation.

6. Claimant's average weekly wage at the time of injury was $272.00, indicating a compensation rate of $181.33.

7. Employer voluntarily paid compensation for temporary total disability from October 21, 1974, through March 7, 1977. The first payment was not made until January 30, 1975, when $2,160.00 was paid, bringing up to date the installments due from October 22, 1974, to January 21, 1975. From January 21, 1975, to March 7, 1977, compensation payments were made on a bi-monthly basis, and the parties agreed there was no controversy as to penalties under Section 14 of the Act with respect to this latter period.

8. Employer has not paid for medical services pursuant to Section 7 of the Act.

9. Claimant has not returned to his regular employment.

Issues

1. Whether the parties are subject to the jurisdiction of the Act.

2. The nature and extent of disability consequent to the injury of October 21, 1974.

Findings of Fact and Conclusions of Law

Based upon the entire record in this case, and my observation of the witnesses and their demeanor, I make the following Findings of Fact and Conclusions of Law.

The stipulations agreed to by the parties are consistent with the evidence, and I find them to be established as facts.

Issue No. 1—Jurisdiction:

Respondents assert that Employer is not subject to the jurisdiction of the Act since it has no employees engaged in maritime employment, and the functions performed by Claimant on the day of the injury were not maritime employment.

Employer was engaged in the business of weighing, sampling, and inspection of various imported commodities, including rubber, the material being handled by Claimant on October 21, 1974. Employer is hired by the importing dealers or their agents. The particular material being handled is unloaded from the ship by longshoremen and placed inside the pier. From that point Employer's personnel move the commodity in position to be weighed, after which the bale is opened by means of pry bars and a cutting instrument to be inspected. The container is reclosed by Employer's men, and then the commodity is moved by longshoremen to its ultimate destination to be accepted by the consignee. Employer's main functions are weighing, reconditioning, and sampling the commodity.

Section 2(3) of the Act defines an "employee" as a person engaged in maritime employment, including any harbor-worker, and Section 2(4) defines an "employer" as anyone who has any employee engaged in maritime employment on navigable waters, including designated adjoining areas. Compensation is paid for disability of an employee arising from an injury occurring upon navigable waters and environs. 33 U.S.C. § 903.

I find and conclude that Employer is engaged in maritime employment, and that at the time of his injury Claimant was doing likewise. It is clear that the weighing, sampling, and reconditioning of the cargo prior to delivery to the consignee is an integral and essential part of the process of unloading and movement of the commodity to the point where it is turned over the consignee. It is also clear that Claimant is a harbor-worker. *Camitros* v. *B. T. Ilsley, Inc.*, 6 BRBS 295, BRB No. 76-366 (July 15, 1977) is virtually on all fours with the case under consideration. I also find and conclude that the injury occurred on navigable waters. 33 U.S.C. § 903.

Issue No. 2—Disability:

At the time of the hearing Claimant was 18 years of age, had completed two years of high school, and had worked for Employer about 20 years.

Claimant testified that on the day he was injured he was engaged in breaking open a bale of rubber when the bale suddenly parted and the pry bar struck him in the chest. (Tr. 20, 21) George W. Anderson, a supervisor for Employer, testified that Claimant told him he didn't feel well, that he had a pain in his chest. Mr. Anderson told him to sit and rest, and later Claimant asked for an ambulance. (Tr. 38, 39)

Mr. Shaughnessy was hospitalized from October 21, 1974, to November 11, 1974, and rehospitalized January 16, 1975, for supra-ventricular tachycardia. (Respondent No. 2)

A report by the Veterans Hospital dated June 8, 1976, showed Claimant's admission on March 5, 1976, and discharge on March 29, 1976. A cardiac catheterization was performed on March 24, and the diagnosis included arteriosclerotic heart disease; coronary insufficiency; old inferior wall myocardial infarction; status post coronary by-pass August 1975; and status post cardiac catheterizations, June 1975 and March 1976. The staff physician remarked that the Claimant was "100 percent totally disabled." Mr. Shaughnessy was discharged to the Outpatient Clinic. He was again admitted May 24, 1976, and discharged May 27, 1976, to the Outpatient Clinic. (Claimant No. 3)

A report by Dr. Seymour S. Cutler dated March 2, 1977, showed he begun treating Claimant in July 1976, and that the most recent treatment was in March 1977, to continue. Dr. Cutler noted there had been 2 hospital admissions because of chest pain and premature ventricular beats. The doctor reports there is a causal connection to an occurrence, but the occurrence to which he refers is not definitely shown in the record. (Claimant No. 2)

Claimant testified that he could not lift weights of five or ten pounds because of numbness in his arms which he attributed to the bypass surgery. (Tr. 32)

I am persuaded by the evidence that Claimant is permanently totally disabled by reason of his arteriosclerotic heart disease. I am also persuaded that Claimant's heart disease is causally connected to his employment. See, e.g., *Collins* v. *General Dynamics*

Corporation, 5 BRBS 675, BRB No. 76-131 (April 5, 1977), *et al.*

Penalties and Interest:

It was stipulated that compensation was not paid until January 30, 1975, when a lump sum of $2,160.00 purported to bring the payments up to date to January 21, 1975. Penalties provided by Section 14(e) of the Act are applicable to that period for each payment not made within fourteen days after the due date, together with interest at the rate of six percent per annum.

The compensation rate is $181.33 per week based on an average weekly wage of $272.00.

It was further stipulated that payments were made on the bi-weekly (semimonthly) basis until March 7, 1977, and that no payments were subject to penalties. The evidence does not indicate otherwise. However, payments subsequent to that time are subject to penalties and interest.

Attorney Fee:

Saul C. Downes, Esquire, and Samuel S. Hyams, Esquire, have submitted a request for an attorney fee of $2,000.00. Respondents have commented thereon.

An attorney fee is payable in this matter; however, I am unable to award a fee on the basis of the application. 20 C.F.R. 702.132 *et seq.* requires the application to be supported by a complete statement of the character and extent of the work done. Time in-

crements of 15 minutes or more should be utilized. Time will be afforded.

Order

1. Respondents shall pay Claimant compensation for permanent total disability based on a compensation rate of $181.33 per week, beginning October 21, 1974, and continuing, said sums to be adjusted pursuant to Section 10(f) of the Act.

2. Respondents shall pay Claimant as additional compensation, pursuant to Section 14(e) of the Act, an amount equal to ten percent of each such payment not paid within fourteen days after due, together with interest thereon at the rate of six percent per annum computed from the date each payment became due until paid.

3. Respondent shall pay for or reimburse Claimant for the reasonable cost of such medical benefits as the nature of Claimant's injury shall require pursuant to Section 7 of the Act.

4. All payments now due Claimant shall be paid forthwith in a lump sum.

5. Respondents shall receive credit for all appropriate payments made to Claimant in this matter.

6. Claimant's counsel shall have twenty days from the date hereof to apply for an attorney fee, with a

copy to Respondents, who shall have an added ten days to comment.

/s/ Freeman C. Murray
FREEMAN C. MURRAY
Administrative Law Judge

Dated: November 14, 1977
Washington, D.C.

FCM:sc

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APPENDIX D

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972[1][2]

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

(5) The term "carrier" means any person or fund authorized under section 32 to insure this Act and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

[1] Includes 1972 amendments made by P.L. 92-576 printed in italic.
[2] The amendments (except section 19(d) of the Act) are effective thirty days after enactment (12:01 a.m., November 26, 1972).

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

COVERAGE

SEC. 3. (a) Composition shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(2) For the purpose of carrying out its functions under this Act, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United Stats Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order. may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such penalty of imprisonment as well as jointly liable with such corporation for such fine.

(e) This section shall not affect any other liability of the employer under this Act.

ADMINISTRATION AND VOCATIONAL REHABILITATION

SEC. 39. (a) Except as otherwise specifically provided, the Secretary shall administer the provisions of this Act, and for such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with the Classification Act of 1923, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subdivision (a) of section 40) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this Act. All expenditures of the Secretary in the administration of this Act shall be allowed and paid as provided in section 45 upon the presentation of itemized vouchers therefor approved by the Secretary.

(b) The Secretary shall establish compensation districts, to include the high seas and the areas within the United States to which this Act applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under sections 18 and 21 of this Act in respect to any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).

(c) (1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

(2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this Act to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available

Supreme Court, U. S.
FILED
APR 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1329

In the Supreme Court of the United States

OCTOBER TERM, 1979

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WALTER TANTZEN, INC., AND INSURANCE COMPANY OF NORTH AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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REPLY MEMORANDUM FOR THE PETITIONER

Respondents urge the Court to deny the Director's petition on the basis of two procedural objections to further review and a substantive argument that the court of appeals expressly declined to consider. Remarkably, respondents offer no defense of the court of appeals' erroneous holding that claimant Shaughnessy's entitlement to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, is dependent upon respondent Tantzen's satisfaction of the definition of "employer" in Section 2(4) of the Act.

1. Respondents contend that the Court should deny the petition because of the "inadequacies in the record" (Br. in Opp. 5). The court of appeals' criticism of the record, however, concerned the alleged dearth of evidence on the question whether Shaughnessy satisfied the so-called "status" requirement in Section 2(3) of the Act, 33 U.S.C.

902(3). The court of appeals thought that the administrative law judge and the Benefits Review Board did not conduct a sufficiently detailed inquiry into the nature of Shaughnessy's work and the nature of "longshoring operations" generally. Without further investigation, the court suggested (Pet. App. 4a-5a & n.4), it would be "difficult, if not impossible," to determine whether Shaughnessy was a "longshoreman or other person engaged in longshoring operations" within the meaning of Section 2(3).

But, the court of appeals held (Pet. App. 6a-7a), such a determination was not necessary for the disposition of respondents' petition for review of the Board's decision because neither the administrative law judge nor the Board found that Shaughnessy or any other employee of respondent Tantzen worked "upon actual, as distinguished from statutorily defined, navigable water of the United States." Accordingly, the court ruled, respondent Tantzen was not a statutory "employer" within the meaning of Section 2(4) of the Act, and therefore Shaughnessy was not covered by the Act even if he was engaged in longshoring operations when he was injured. This is the decision that the Director now asks this Court to vacate and remand for reconsideration in light of *P.C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979). The supposed "inadequacies in the record" identified by the court of appeals did not relate to the question actually decided by the court and therefore provide no reason for a denial of review.

Indeed, when an employment-related injury occurs on a covered "situs" (as Shaughnessy's undisputedly did), the only relevant inquiry under the Act is the precise question the court of appeals found it unnecessary to answer: whether the claimant satisfies the "status" test, *i.e.*, qualifies as an "employee" under Section 2(3) of the Act.

The purpose of the remand sought by the Director is to afford the court of appeals an opportunity to reconsider in light of *Pfeiffer* its construction of the phrase "maritime employment" in Section 2(4) of the Act and then to address the question (Shaughnessy's "employee" status) that was the only one controverted by the parties below and is the only one dispositive of Shaughnessy's coverage under the Act. Whether the present record is adequate for judicial review of the Board's determination that Shaughnessy is an employee within the meaning of Section 2(3) has no bearing whatever on the need for review by this Court to correct the court of appeals' misinterpretation of Section 2(4).

2. Respondents further contend (Br. in Opp. 6-11) that the Director lacks "standing" to petition for a writ of certiorari in this case. In support of this proposition, respondents cite Section 21(c) of the Act, 33 U.S.C. 921(c), which provides that an appeal may be taken to a court of appeals by "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board." That provision, respondents contend, bars the Director from seeking review in this Court. Section 21(c) is irrelevant in the present context, however, because it applies only to review in the courts of appeals. In this Court, review is governed by 28 U.S.C. 1254(1), which permits "any party" to a civil or criminal case to petition for a writ of certiorari. The Director was a party in the court of appeals[1] and is therefore entitled by statute to petition for review in this Court.

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[1]See *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F. 2d 35, 42-43 n.5 (2d Cir. 1976), aff'd sub nom. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977); *United Brands Co.* v. *Melson*, 569 F. 2d 214 (5th Cir. 1978).

Moreover, the cases on which respondents primarily rely, *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F. 2d 337 (5th Cir. 1978), and *Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, No. 79-759 (Jan. 14, 1980), are inapposite. In those cases it was the Director who sought review of a Board order in the court of appeals. The Second Circuit and the Fifth Circuit declared that the Director was not a party "adversely affected or aggrieved" within the meaning of Section 21(c). Even if correct,[2] those cases have no application here, where the employer and its insurer are the aggrieved parties who sought review in the court of appeals. The claimant and the Director prevailed before the Board, and respondents sought to overturn the Board's decision in the court of appeals, where the Director was named and participated as a party defending the Board's order. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977).

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[2]The Director believes that he is entitled to petition for court of appeals' review of a Board decision adverse to his position concerning the proper administration of the Act. As respondents concede (Br. in Opp. 7-9), several courts of appeals have recognized the Director's standing to seek review of an unfavorable Board decision in the context of the Black Lung Act, which incorporates the judicial review provisions of the LHWCA. See 30 U.S.C. 925(a)(4) and (5); 30 U.S.C. 932(a); *Director, OWCP* v. *Peabody Coal Co.*, 554 F. 2d 310 (7th Cir. 1977); *Director, OWCP* v. *National Mines Corp.*, 554 F. 2d 1267 (4th Cir. 1977); *Krolick Contracting Corp.* v. *Benefits Review Board*, 558 F. 2d 685 (3d Cir. 1977); *Director, OWCP* v. *Alabama By-Products Corp.*, 560 F. 2d 710 (5th Cir. 1977); *Director, OWCP* v. *Eastern Coal Corp.*, 561 F. 2d 632 (6th Cir. 1977). The question whether, under the LHWCA, the Director independently may obtain court of appeals' review of Board decisions with which he disagrees is currently being litigated in a number of circuits and ultimately may require this Court's attention. That question, however, is not presented here, where the Director defended the Board's order in the court of appeals and continues to defend it in this Court.

Although aware of several prior challenges to the Director's right to party status in cases under the Act, this Court has recognized the Director's capacity to petition for certiorari. Ten days after discussing in *Caputo* the propriety of the participation of the Director in the court of appeals (432 U.S. at 256 n.11), this Court, on a petition for certiorari filed by the Director alone without participation by the claimant, vacated the court of appeals' judgment in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (5th Cir. 1976), and remanded for further consideration in light of *Caputo*. See *Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), aff'd on remand, 575 F. 2d 79 (5th Cir. 1978), cert. denied, 440 U.S. 967 (1979).

A year later, the Court again considered a petition for certiorari filed by the Director, this time in a case in which the Director challenged the result reached by the Board (and affirmed by the court of appeals). *Director, OWCP* v. *Rasmussen*, 436 U.S. 955 (1978). The Court granted the petition without expressing any doubts about the propriety of the Director's status in the case, even though the petition itself (77-1465 Pet. 2 n.1) directed the Court's attention to the issue. It may be that the Court in *Rasmussen* thought it unnecessary to address the question of the Director's standing because the affected employer and insurer also petitioned for a writ of certiorari to review the decision of the Board and the court of appeals (No. 77-1491). Even if that is the explanation for the treatment of the Director's petition in *Rasmussen*, however, and even if there may remain some question about the propriety of the Director's petitioning by himself to challenge a Board ruling sustained by the court of appeals, it is clear that, in circumstances like those presented in *Jacksonville Shipyards* and the present case, the Director ought to be permitted independently to

seek review in this Court of a court of appeals' decision *overturning* an order of the Board.

The Director is the official in the Department of Labor responsible for the general administration of the LHWCA. See 33 U.S.C. 939; 20 C.F.R. 701.201-701.203. Frequently, a court of appeals' panel will set aside the Board's ruling in favor of a claimant in a case (such as the present one) where the financial incentive for the claimant himself is insufficient to justify a petition for certiorari. If the Director cannot appear in this Court to defend the Board's decision in such cases, the court of appeals' panels would establish the law for their circuits in a manner effectively immune from further review. The statutory questions involved would thus be settled for the circuits, and there would be no way for the Director or the Board to correct the problem before other injured claimants were improperly denied benefits. Congress surely did not intend such a result when it enacted the LHWCA and, despite respondents' assertions, there is no serious question about the standing of the Director to defend the Board's rulings.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted and the case remanded for reconsideration in light of *Pfeiffer*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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